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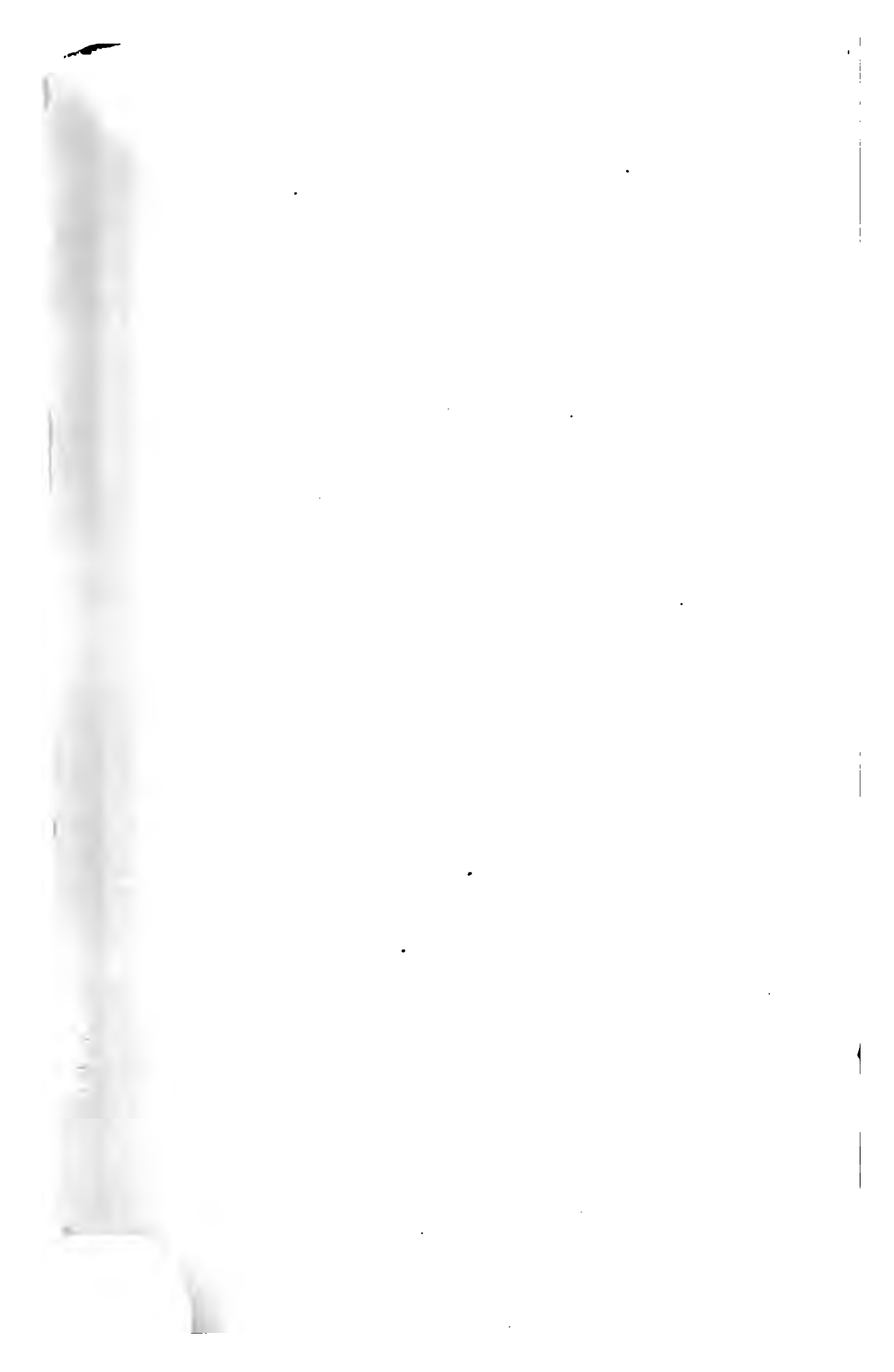
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-BOOKS
CITED, STATUTES CITED AND CONSTRUED,
AND AN INDEX**

GEO. W. SELF,
OFFICIAL REPORTER

SOL. H. ESAREY, Assistant Reporter

VOL. 45

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME

HON. DAVID A. MYERS.*††
HON. DANIEL W. COMSTOCK.‡
HON. FRANK S. ROBY.§
HON. JOSEPH M. RABB.||†
HON. WARD H. WATSON.†
HON. CASSIUS C. HADLEY.†

*Chief Judge at November Term, 1909.

||Presiding Judge at November Term, 1909.

‡Elected in 1896; reelected in 1898, 1902 and 1906.

§Appointed March 21, 1901; elected in 1902 and 1906.

††Appointed October 18, 1904; elected in 1904 and 1908

†Elected in 1906.

OFFICERS
OF THE
APPELLATE COURT

ATTORNEY-GENERAL,
JAMES BINGHAM

REPORTER,
GEO. W. SELF

CLERK,
EDWARD V. FITZPATRICK

SHERIFF,
GEORGE HUTTO

LIBRARIAN,
OMAR O'HORROW

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1909, IN THE NINETY-THIRD AND NINETY-FOURTH YEARS OF THE STATE.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY *v.* WOOD ET AL.

[No. 5,988. Filed May 26, 1908. Rehearing denied June 4, 1909.
Transfer denied December 10, 1909.]

1. **COURTS.**—*Jurisdiction.*—*Interstate Commerce.*—*Breach of Federal Statute.*—The jurisdiction of an action for the breach of a duty imposed by a provision of the interstate commerce law, is in the federal court. p. 7.
2. **COURTS.**—*Jurisdiction.*—*Interstate Commerce.*—*Breach of Shipping Contracts.*—*Railroads.*—The jurisdiction of an ordinary action for damages for the breach of a contract by a carrier to transport freight to a city in another state, is concurrently in the state and federal courts. p. 7.
3. **COURTS.**—*Jurisdiction.*—*Interstate Commerce.*—*Railroads.*—*Breach of Common-Law Duty.*—An action against a railroad company for failure to furnish cars for shipment into another state is not founded upon the interstate commerce act, but upon a breach of such company's common-law duty. p. 8.
4. **REMOVAL OF CAUSES.**—*Failure to Move for.*—*Jurisdiction.*—Where a case is removable to the federal court, but the parties fail to move therefor, the state court has jurisdiction to try the case. p. 9.
5. **BANKRUPTCY.**—*Jurisdiction.*—The federal courts have exclusive jurisdiction of proceedings in bankruptcy. p. 9.
6. **APPEAL.**—*Overruling Motion to Separate Causes.*—The erroneous overruling of a motion to separate the causes of action stated in the complaint does not constitute reversible error. p. 9.
7. **CARRIERS.**—*Railroads.*—*Failure to Provide Cars.*—*Kinds of.*—*Complaint.*—A complaint alleging that defendant railroad company was a common carrier of grain between certain points, that

- the plaintiffs tendered grain for shipment to such points and demanded "suitable cars" therefor, and that defendant refused to furnish them, sufficiently shows the kind of cars demanded. p. 10.
8. **CARRIERS.—Railroads.—Complaint.—Conclusions.**—An allegation that defendant railroad company held itself out as a carrier of goods between certain points is one of fact, and not a mere conclusion. p. 10.
9. **CARRIERS.—Railroads.—Issuance of Bills of Lading.—Failure to Allege.—Complaint.**—A complaint against a railroad company for failure to furnish cars for the shipment of grain to a certain point beyond its own line, is not bad for failing to allege that such company issued bills of lading to points beyond its own line, there being an allegation that the company held itself out as a carrier to such points. p. 10.
10. **CARRIERS.—Railroads.—Freight.—Payment of.—Complaint.**—A complaint alleging that the plaintiffs tendered their grain to defendant railroad company for shipment and that they were "willing, ready and able to pay" the freight thereon, is sufficient, since the quantity of grain to be shipped depended on the number and capacity of the cars to be furnished. p. 11.
11. **CARRIERS.—Railroads.—Freight Discriminations.—Complaint.**—A complaint alleging that defendant railroad company "unlawfully, habitually and wilfully discriminated against plaintiffs and their stations" in favor of other cities, sufficiently alleges discriminations. p. 11.
12. **CARRIERS.—Railroads.—Shipments Beyond Own Lines.—Evidence.**—Evidence that a railroad company held itself out as a carrier of freight to certain points sustains a judgment against it for refusing to furnish cars to use for shipment thereto, though such company's bills of lading, to the plaintiffs' knowledge, limited its liability at a certain intermediate point. p. 11.
13. **APPEAL.—Evidence.—Sufficiency.**—In determining the sufficiency of evidence to sustain a verdict, only that favorable to the successful party will be considered. p. 12.
14. **CARRIERS.—Railroads.—Discrimination.—Evidence.**—Evidence that shippers at junction points were furnished with desired cars and that the plaintiffs, at intermediate points, were furnished none, shows a discrimination. pp. 12, 17.
15. **CARRIERS.—Railroads.—Refusal to Transport Freight.—Tender of Payment of Charges.**—Evidence that the plaintiffs were ready, willing and able to pay freight charges is admissible in an action against a railroad company for failing to transport goods. p. 12.
16. **DAMAGES.—Measure of.—Railroads.—Delay in Transporting Goods.**—The damages recoverable against a railroad company for its delay in transporting goods is the difference in price of the goods at the time when they should have arrived, and when they

- actually arrived at their destination, less the freight charges.
p. 12.
17. DAMAGES.—*Diminution of.—Expenses.—Railroads.—Freight.*—A shipper whose freight is refused by a railroad company must handle his goods so as to reduce as much as possible his damages, and, in doing so, is entitled to recompense for expenses incurred.
p. 13.
18. CARRIERS.—*Railroads.—Refusal to Transport Grain.—Damages.*—Where a railroad company refused to transport the plaintiffs' grain to Baltimore, and by reason thereof they were compelled to transport such grain to another point to preserve it, the damage consists in the difference between the selling price received, after making allowance for the difference in the cost of transportation, and the selling price at Baltimore when it should have arrived there. p. 13.
19. TRIAL.—*Instructions.—How Considered.*—Instructions will be considered as a whole, and if they fairly state the law, and the jury were not misled thereby, the judgment will not be reversed, though a single instruction alone might seem incorrect. p. 13.
20. CARRIERS.—*Railroads.—Instructions.—Omissions.—Supplying by Others.*—An instruction failing to state that if it was impossible for defendant railroad company to deliver the grain, the company would not be liable, is not misleading where a subsequent instruction expressly told such jury that under such circumstances the company would not be liable. p. 14.
21. CARRIERS.—*Railroads.—Discrimination.—Instructions.*—An instruction that discrimination by railroad companies, as to shippers, is unlawful only when the conditions are similar, is not erroneous. p. 14.
22. TRIAL.—*Instructions.—Abstract.—Failing to Apply.*—An abstract instruction is not erroneous, where the application thereof to the facts is made in other instructions. p. 14.
23. CARRIERS.—*Railroads.—Failure to Transport.—Instructions.*—An instruction that if defendant railroad company held itself out to transport goods to a certain point it would be liable for its failure to furnish cars to ship to such point, is not erroneous. p. 15.
24. CARRIERS.—*Railroads.—Transporting Freight.—Duty.—Complaint.*—A complaint alleging that defendant railroad company held itself out as a common carrier of grain to certain points, that the plaintiffs demanded cars in which to ship grain to such points, and that they were ready and willing to pay the charges, shows a duty on the part of the company to furnish the cars desired. p. 16.
25. RAILROADS.—*Common-Law Duty.*—At the common law it is a railroad company's duty to serve the public impartially. p. 16.

From Howard Circuit Court; *J. F. Elliott*, Judge.

Action by George G. Wood and another against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

John L. Rupe and *G. E. Ross*, for appellant.

L. B. Nash, *J. K. Roberts*, *Blackledge & Wolf* and *Miller, Shirley & Miller*, for appellees.

WATSON, J.—Appellees sued appellant to recover damages for failure to furnish cars for shipment of corn from appellees' elevators at Windfall City, Curtisville and Nevada, Tipton county, Indiana, and at Hemlock, Howard county, Indiana.

The amended complaint, as filed, was in six paragraphs, but the third paragraph was dismissed. The first paragraph of the amended complaint, in substance, alleges that the plaintiffs are owners of large and expensive grain elevators at Windfall City, Curtisville and Nevada, Tipton county, Indiana, and at Hemlock, Howard county, Indiana; that defendant owned and operated the only line of railroad passing said stations named, and that it advertised and held itself out as a "carrier of grain to Chicago, Cincinnati, Indianapolis, Baltimore and Newport News without change of cars, and solicited plaintiffs' business as such through carrier;" that from November 22, 1902, to May 23, 1903, plaintiffs purchased and had stored in their said elevators, located at the several points named, large quantities of corn for shipment to Baltimore, Newport News and other markets named, and from day to day between said named dates demanded from defendant cars for the shipment of such corn; that defendant failed to furnish cars for the shipment of the corn from the elevators at the times demanded, or within reasonable time after demand, by reason of which unreasonable delay in furnishing cars the corn heated in such elevators and was thereby damaged; that plaintiffs

were compelled to pay interest upon capital used in the purchase of corn, by reason of the defendant's unreasonable delay in furnishing cars for shipment; that after demand had been made by plaintiffs for cars, and a reasonable time had elapsed for furnishing them, defendant raised its freight rates on corn shipments so that plaintiffs were required to pay an advanced rate when the corn was shipped; that after plaintiffs had demanded cars for the shipment of their corn, and a reasonable time had elapsed for furnishing them, the price of corn in the market declined, so that, by reason of the failure of defendant to furnish cars within a reasonable time, plaintiffs suffered loss and damage, in interest paid on money invested in corn, to the amount of \$2,000, on account of deterioration of corn by heating in their elevators, \$4,000, on account of additional freight paid, because of the raising of the rate by appellant, \$2,000, and on account of loss in decline of market, \$15,000—in all \$23,000.

The second paragraph of the amended complaint alleges substantially the same facts as the first, except that the second alleges a different theory, as a basis of recovery, and facts in support of such theory, viz.: That at all times from November 22, 1902, to May 23, 1903, defendant was supplied with an ample number of cars and other facilities properly and promptly to receive and transport any and all grain offered for shipment along its lines, including the stations of Hemlock, Nevada, Curtisville and Windfall City, where plaintiffs' elevators were; that plaintiffs had no other means of shipment than defendant's line of road, and were at all times ready to pay the freight charges, but that defendant, during the entire period between the dates named, unlawfully, habitually and wilfully discriminated against plaintiffs and their stations in favor of the cities of Kokomo and Elwood and the town of Bunker Hill, at which points there were competing lines of railroad, and at other points where there were competing lines; that in

April and May, 1903, plaintiffs were compelled to send 5,000 bushels of heated corn to Toledo, Ohio, to be cured and kiln dried, at a total cost of \$500, and the damages claimed under this paragraph are on account of advance in freight rates, \$2,000; on account of decline in market price, \$15,000; on account of interest, \$1,000; on account of deterioration in grain, \$1,000; on account of curing grain, \$500—in all \$19,500.

The fourth and fifth paragraphs of the complaint are, as to their allegations, the same as the first and second, except that they relate wholly to the business of the firm carried on at the elevator and mill at Windfall City, and operated in the name of Jesse C. Hadley. The sixth paragraph alleges that contracts were made in the name of Jesse C. Hadley for shipments of grain in November, 1902, to John R. Gray, Indianapolis, Indiana, 10,000 bushels of corn, and to F. M. Murphy, Indianapolis, Indiana, 10,000 bushels of corn, and that plaintiffs were required to pay under said contracts, for their default therein occasioned by defendant's failure to furnish cars, \$250 to John R. Gray, and \$700 to F. M. Murphy.

Appellant's motion to separate and number the causes of action set forth in each paragraph of the complaint was overruled, also the separate demurrers to each paragraph thereof. At the close of appellees' evidence appellant moved to dismiss the cause for want of jurisdiction, but the motion was overruled. The cause was tried before a jury, which returned a verdict for appellees, and judgment was rendered thereon in the sum of \$2,500. A motion for a new trial was then made and overruled.

The errors assigned and relied upon in this appeal were: (1) Overruling the motion to dismiss for want of jurisdiction; (2) overruling the motion to separate and number the several causes of action set forth in the first, second, fourth, fifth and sixth paragraphs of the complaint; (3)

overruling appellant's demurrer to each of said paragraphs;
(4) overruling the motion for a new trial.

A question of primary importance urged in this case is that of jurisdiction. Appellant contends that since the action was for damages for failing to furnish cars to ship corn, which the evidence showed was to be carried beyond the boundaries of the State, it was an action arising under the interstate commerce act, and that exclusive jurisdiction thereof was vested in the federal courts.

It has repeatedly been held that the jurisdiction of all actions, brought under the remedial sections of the

1. interstate commerce act to enforce its provisions, is exclusively in the federal courts.

But where the action neither arises from said act, nor is based thereon, a cause, the subject-matter of which pertains to interstate commerce, is one in which a federal

2. question may be raised, and if so, then the federal courts have jurisdiction concurrent with that of the State courts, and there is proper ground for a petition to remove to the federal courts. Judson, Interstate Commerce, §§44, 248.

The case of *Murray v. Chicago, etc., R. Co.* (1894), 62 Fed. 24, was an action to recover damages for alleged unreasonable rates charged for transporting freight. At pages 42 and 43 the court said: "A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the state cannot legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the Nation and of the several states do not necessarily apply to the judicial branches of the national and state govern-

ments. The legislature of a state cannot abrogate or modify any of the provisions of the federal Constitution or of the acts of congress touching matters within congressional control, but the courts of the state, in the absence of a prohibitory provision in the federal Constitution or acts of congress, have full jurisdiction over cases arising under the Constitution and laws of the United States. The courts of the states are constantly called upon to hear and decide cases arising under the federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the laws of the state, when the adverse parties are citizens of different states. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a state cannot abrogate or change it, but the courts of the state may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond state legislative control, does not, *ipso facto*, prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete."

In the case we are considering the action was based upon the carrier's common-law duty to furnish facilities for shipping, and, although the damage arose by the act of

3. a carrier engaged in interstate business, the action is not one to enforce the act of congress regulating commerce between the states.

Had appellant petitioned, at the proper time, for removal from the state to the federal courts, then the cases cited in

its brief would have been applicable; but since no
4. such step has been taken there was nothing to oust
the State of its jurisdiction over the cause of action.
The case of *Lowry v. Chicago, etc., R. Co.* (1891), 46 Fed.
83, relied upon by appellant, was a suit for damages arising from discrimination in freight rates, and the railroad company petitioned for a removal to the federal courts. It was held that since the construction and application of the interstate commerce act was involved, it was a case in which a federal question was raised, and therefore was properly one for removal. The theory of the decision is entirely inconsistent with appellant's contention that the state courts have no jurisdiction whatever over similar cases, for the right of removal is premised on the fact that the state court does have jurisdiction; but, because a federal question is involved, the party against whom such question is raised in such an action has the privilege, at his election, at the proper time, of having such cause removed to the federal court. This must be so, otherwise there would be the anomalous result that a party, by a petition for removal, would avoid what would otherwise be an absolute defense, i. e., want of jurisdiction to an action brought against him in the state court.

The cases pertaining to bankruptcy are not in point
5. in this controversy since, by statute, the federal courts have exclusive jurisdiction of matters in bankruptcy.
The assignment of error in overruling the motion to separate the causes of action stated in the complaint need not
be considered, for the reason that even if the motion
6. were improperly overruled it does not constitute reversible error. *City of Huntington v. Stemen* (1906), 37 Ind. App. 553; *Board, etc., v. Redifer* (1903), 32 Ind. App. 93; *Brown v. Bernhamer* (1902), 159 Ind. 538; *Car-gar v. Fee* (1895), 140 Ind. 572; §346 Burns 1908, §341 R. S. 1881.

The sufficiency of the complaint is attacked. The objections will be considered in their order.

It is first urged that the complaint does not allege the class of cars demanded, or the destination of the grain. It

was averred that appellant was a common carrier of
7. grain, that appellees tendered grain for shipment, and demanded "suitable cars" therefor; that appellant held itself out to be a common carrier to certain cities, naming them, among which number was Baltimore, and that appellees "tendered grain for shipment to the markets aforesaid." There could be no uncertainty, on the part of appellant, as to the class of cars wanted by appellees. When the kind of freight and the destination were made known, and demand made for "suitable cars," appellees had particularized the class as far as they were lawfully required to do. The power to designate the specific cars to be used for these shipments lay entirely with appellant, and it cannot be heard to say that a more exact classification by appellees was necessary.

Appellant also contends that the allegation that it held itself out as a through carrier to the seaboard markets is a conclusion. The objection is not well taken.

8. The averment comes within the well-settled rule that it is not necessary to plead evidence, but that pleading the ultimate fact to be proved is sufficient. *Guenther v. Fohey* (1901), 26 Ind. App. 93; *Pennsylvania Co. v. Zwick* (1891), 1 Ind. App. 280, and cases cited.

The absence of an allegation that appellant issued bills of lading obligating itself to carry goods to points beyond its own lines is not material to the issues. Such a fact

9. may be material as evidence to support the averment that appellant held itself out as a through carrier to the seaboard, but its absence will not render the complaint insufficient.

The complaint is also attacked for failure to allege payment of the freight on the goods tendered. It was alleged

that the goods were tendered and that appellees were
10. "willing, ready and able to pay" the charges thereon.

The objection will not avail appellant. The action was not for damages for refusing to carry certain specified property. There would be no basis for computing the amount of charges due, since the quantity of grain to be shipped depended entirely upon the number and capacity of cars furnished by appellant. The allegations in reference to charges were sufficient. *Central, etc., R. Co. v. Morris* (1887), 68 Tex. 49, 3 S. W. 457, 28 Am. and Eng. R. Cas. 50.

The allegations as to discrimination were also sufficient.

Chicago, etc., R. Co. v. Wolcott (1895), 141 Ind. 267,

11. 274, 50 Am. St. 320. The averments of the complaint were adequate to withstand the demurrer.

As ground for the assignment of error in overruling the motion for a new trial, appellant attacks the sufficiency of the evidence. It is earnestly contended that since the

12. shipper knew that goods were shipped only under appellant's uniform bill of lading, and since such bills of lading expressly limit appellant's liability to its own line, therefore appellees knew that appellant was not bound to carry east-bound goods beyond Pittsburg. It is true that said bills do make such a limitation, but there is nothing therein to indicate the terminus of such line. That must be determined entirely by extrinsic evidence, and if appellant has held itself out to appellees as a through carrier to the seaboard it cannot successfully contend that, although it made such representations, it is not bound thereby, for the reason that, as a matter of fact, its road extends only to Pittsburg. The actual extent of a line of railroad is a fact peculiarly within the knowledge of its owners, and the source of information open to those dealing with such road is almost exclusively the representations made by the agents thereof.

Under the recognized rule, that in determining the suffi-

ciency of evidence this court will consider only the evidence favorable to the matter in dispute (*Lake Erie, etc., R.*

13. *Co. v. Stick* [1896], 143 Ind. 449; Ewbank's Manual, §46), it is clear that there was evidence from which the jury could well find, as a matter of fact, that appellant held itself out to appellees as a through carrier to the sea-board.

On the question of discrimination, there was evidence to show that appellees were engaged in the same kind of business as those shippers who were located at points

14. where appellant had competition, and who were preferred in the assignment of cars. Appellee's places of business were in close proximity to such competitive points, and their business was conducted in the same manner as that of the alleged preferred shippers. Furthermore, appellees had only one route for shipping their grain, i. e., by appellant's line. They constantly applied for cars during the time of the alleged discrimination. There was sufficient similarity of conditions shown to justify the admission of evidence to prove the number of cars supplied shippers at competitive points.

Since the allegation that appellees were ready, willing and able to pay the freight charges was material, evidence to that effect was admissible

Objection is made also to the rule of damages applied in this case, as well as to the evidence admitted as competent to establish the damage to appellees. The cars re-

16. quested were for shipments of corn to Baltimore.

The measure of damages for delay in the shipment of goods intended for sale is the difference between the price of the goods at the time they should reasonably have arrived at the point of destination and the price at the time they actually arrived, less the transportation charges. *Michigan, etc., R. Co. v. Caster* (1859), 13 Ind. 164; *Pittsburgh, etc., R. Co. v. Morton* (1878), 61 Ind. 539, 28 Am. Rep. 682; *Bridgman v. Steamboat Emily* (1865), 18 Iowa 509; *Mc-*

Govern v. Lewis (1867), 56 Pa. St. 231, 94 Am. Dec. 60; 3 Hutchinson, Carriers (3d ed.), §1370.

But the shipper is under a duty so to handle the goods as to reduce the damages as much as possible. He is entitled to have considered, in estimating his damages, the

17. necessary expense to which he was put in thus reducing the damages. *Pittsburgh, etc., R. Co. v. Racer* (1892), 5 Ind. App. 209; *Louisville, etc., R. Co. v. Flanagan* (1888), 113 Ind. 488, 3 Am. St. 674; *Pittsburgh, etc., R. Co. v. Morton, supra*; *Chicago, etc., R. Co. v. Wolcott* (1895), 141 Ind. 267, 50 Am. St. 320; *Shelby v. Missouri Pac. R. Co.* (1898), 77 Mo. App. 205; *Fort Worth, etc., R. Co. v. Daggett* (1894), 87 Tex. 322, 28 S. W. 525; *Sangamon, etc., R. Co. v. Henry* (1852), 14 Ill. 156; *Briggs v. New York Central R. Co.* (1858), 28 Barb. (N. Y.) 515.

If then the shipper, in pursuance of his duty to reduce the damages as much as possible, ships the corn to other points and there sells it, the measure of damages

18. would be that applied in this case, i. e., the difference between the value of the corn at Baltimore when it should have arrived there and the actual selling price at the point where the grain was disposed of, with the proper adjustment of the difference in the cost of transportation. The time when the corn was sold was a reasonable time when, if cars had been furnished, it should have been placed on the Baltimore market.

Appellant attacks instructions eight, nine, ten, twelve and thirteen, given by the court at the request of appellees, on the grounds that they are incomplete, uncertain, indefinite and misleading.

It is a well known rule of this court that instructions will be considered as a whole, and if, when taken together, the law is correctly given, the cause will not be reversed,

19. though a single instruction alone might seem to be incorrect. *Cleveland, etc., R. Co. v. Penketh* (1901), 27 Ind. App. 210; *Indiana, etc., Gas Co. v. Anthony* (1901),

26 Ind. App. 307; *Musser v. State* (1901), 157 Ind. 423; *Morgan v. Hoadley* (1901), 156 Ind. 320. When it is evident from construing all the instructions together that the jury was not misled, there will be no reversible error therein. *Citizens St. R. Co. v. Hamer* (1902), 29 Ind. App. 426; *Van Camp, etc., Iron Co. v. O'Brien* (1902), 28 Ind. App. 152; *Indianapolis St. R. Co. v. Hockett* (1903), 159 Ind. 677; *Shields v. State* (1897), 149 Ind. 395.

Instruction eight, given at the request of appellees, is attacked for not being made to apply to a given state of facts, but instruction ten sets out a state of facts, and states

20. that the instruction would apply thereto if such facts were found to be true. The latter instruction also enumerates facts which, if proved, would be sufficient to support the finding that appellant held itself out as a through carrier to Baltimore. By instruction three, given at appellant's request, the jury was told that if delivery of the grain at Baltimore was impossible, the carrier was not under a duty to furnish cars therefor, thus supplying that alleged deficiency.

That there was evidence of discrimination to which the instructions pertaining thereto would apply, has been shown.

The jury was specifically told, in instruction eleven,

21. requested by appellees, that discrimination was unlawful only when the conditions were similar.

It is urged that instruction nine, requested by appellees, is also open to the objection that the facts to which it would apply are not set forth. But at the request of appel-

22. lant the jury was told that if Baltimore was not on appellant's line of road, and appellant only offered and undertook to carry corn to the end of its line, it was not liable for failure to transport said corn; and also that there would be no liability for the refusal so to carry unless it was shown by a preponderance of the evidence that appellant was a common carrier to Baltimore, or had expressly or impliedly agreed to carry thereto.

Instruction ten, requested by appellees, told the jury that if appellant's lines extended to Pittsburg, and it maintained traffic arrangements with lines connecting thereat and 23. extending to Baltimore and Newport News, so as to have through transportation, and if appellant during said time held itself out as a through carrier to Baltimore and Newport News, it would be liable for all damages resulting proximately from a failure to carry goods offered in accordance with such representations. In other words, the instruction says that if, as between appellant and other lines connecting at Pittsburg, there was a traffic arrangement whereby appellant could have grain, received on its own lines, transported to said cities without change, but if, as between appellant and those offering goods for shipment, appellant represented and held itself out to be a through carrier to said points of destination, then appellant would be liable for all damages arising proximately from a failure to carry the goods in accordance with such representations. This is a fair statement of the law as applicable to the facts in this case.

The rule of damages laid down in this case in instruction thirteen, given at the request of appellees, conforms with that indicated in this opinion, and there was nothing therein to mislead the jury.

Considering the instructions as a whole, the law as applicable to the facts herein was correctly submitted to the jury. The record in this case is voluminous, and the briefs exhaustive, but a careful investigation of both has failed to disclose reversible error on the part of the court below.

Judgment affirmed.

Rabb, C. J., Comstock, Myers and Hadley, JJ., concur.

Roby, J., absent.

ON PETITION FOR REHEARING.

WATSON, J.—Counsel for appellant have presented an able and forceful brief in support of their petition for a rehearing in this cause. We have carefully considered the arguments submitted and the additional authorities cited, but are not persuaded that they lead to any conclusion different from that stated in the original opinion.

Appellant insists that the averments of the complaint fail to allege any duty owing by appellant to appellees. With this contention we cannot agree. The averments were, in

24. substance, that appellant was a common carrier, operating lines of railroad to Pittsburg and other points named, but that it held itself out to appellees as a through carrier to Baltimore and Newport News; that by traffic agreements it was able to carry goods through to Baltimore and Newport News without change in transit. This is not a case in which is involved the question of damage by a connecting carrier, and authorities pertaining thereto are not in point.

Under the common law it is the duty of a common carrier to serve the public without partiality and without discrimination. *Chicago, etc., R. Co. v. Wolcott* (1895),

25. 141 Ind. 267, 50 Am. St. 320; *New England Express Co. v. Maine Cent. R. Co.* (1869), 57 Me. 188, 2 Am. Rep. 31; *Chicago, etc., R. Co. v. People* (1873), 67 Ill. 11, 16 Am. Rep. 599; 5 Am. and Eng. Ency. Law (2d ed.), 177. Therefore, if appellant chose to make traffic agreements with connecting lines, and thereby was able to hold itself out to the public as a through carrier to points beyond the termini of its own lines, it must, so long as such agreements continue in effect, afford the same facilities to all shippers along its lines who are doing business under similar circumstances.

It is further alleged in the complaint that shippers in Kokomo, Elwood and Bunker Hill, at which points appellant must compete with other railroads, were furnished cars for

shipping corn to the points to which appellees wished to ship, and that the number of cars so furnished was excessively out of proportion to the number furnished to appellees. The averments of the complaint are, therefore, sufficient to charge appellant with the duty of furnishing appellees with their due proportion of cars to points on its own lines, or to points beyond the termini of the same, to which appellant has held itself out as a through carrier.

The record discloses evidence showing that appellant was guilty of unreasonable discrimination as charged in the complaint. Shippers from the points where appellant

14. had competition testified to the number of cars they received during the period within which the discrimination was charged. They testified further to the fact that during such time, appellant furnished them with cars and transported their corn to Baltimore, Newport News, New York City and other points beyond the termini of its own lines.

This reinvestigation of the questions presented does not reveal any reason for reversing the conclusions reached in the original opinion.

The petition is therefore denied.

SPENCER ET AL. v. SMITH.

[No. 6,604. Filed February 18, 1909. Rehearing denied April 30, 1909. Transfer denied December 10, 1909.]

1. ATTORNEY AND CLIENT.—*Collections.—Liability.*—An attorney is liable to his client upon demand for money collected for such client. p. 19.
2. ATTORNEY AND CLIENT.—*Collections.—Notice.*—It is the duty of an attorney, within a reasonable time after collecting money for a client, to notify such client of such fact. p. 19.
3. ATTORNEY AND CLIENT.—*Collections.—Recovery of Fees.—Instructions.*—In an action by a client against her attorneys, for

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the recovery of money collected by them for her, an instruction that the jury should ascertain the amount collected and deduct therefrom a reasonable sum for attorneys' fees, and return a verdict for the remainder with interest, properly protects the interests of the attorneys. p. 20.

4. **APPEAL.**—*Affirmance with Damages.*—The Appellate Court, in its discretion, may affirm a judgment with damages. p. 20.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by Carrie B. Smith against William W. Spencer and another. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Warwick H. Ripley, George W. Brill and George C. Harvey, for appellant.

William Watson Woollen, Evans Woollen and Russell T. Byers, for appellee.

ROBY, J.—This action was brought by appellee, and the complaint is as follows: "Carrie B. Smith, plaintiff, complains of William W. Spencer and Edwin W. Spencer, defendants, and says that the defendants are, and for many years past have been, practicing attorneys at law in Marion county, Indiana; that prior to June 1, 1904, the plaintiff placed in the hands of the defendants for collection a claim against the estate of John B. Casey, deceased; that June 3, 1904, the defendants collected on said claim the sum of \$47.48; that April 15, 1905, they collected an additional sum of \$2,165.32; that said defendants concealed the fact that they collected said sums of money until June, 1906, notwithstanding the fact that she repeatedly made inquiries of them whether they had made such collections; that on June 10, 1906, they admitted to her that they had made such collections and appropriated the money to their own use, and they then and there furnished her with a statement which is in the words and figures following:

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William W. Spencer. Edwin W. Spencer.
 New Telephone 1505.
SPENCER & SPENCER,
 Attorneys at Law.

Rooms 214-216 Unity Bldg., 147 E. Market St.,
 Indianapolis, Ind.

July 10, 1906.

This is to certify that we collected for Carrie B. Smith the following amounts:

June 3, 1904.....	\$ 47.48
April 15, 1905.....	2,165.32
Total	\$2,212.80
September 15, interest to date.....	179.40
	<hr/>
	\$2,392.20

Spencer & Spencer,
 By Wm. W. Spencer.'

"She further says that she frequently demanded payment of the defendants of the balance shown by said statement, but they have neglected to make payment and that the same remains unpaid. Wherefore the plaintiff demands judgment against the defendants for \$2,500 and all other proper relief."

Various answers were filed, and the issue made was tried by a jury and a verdict returned and judgment rendered for \$1,974.33.

Fifty-four points for reversal are stated. Not one of them is well taken. An attorney is liable on demand

1. to pay over money received by him. *Black v. Hersch* (1862), 18 Ind. 342; *Pierse v. Thornton* (1873), 44 Ind. 235; *Claypool v. Gish* (1886), 108 Ind. 424; *Weeks, Attorneys at Law* (2d ed.), §308.

It is the duty of an attorney who has collected money for his client to give the latter notice of such fact

2. within a reasonable time. *Weeks, Attorneys at Law* (2d ed.), §§308, 309.

The evidence has not been brought to this court. The following instruction was given: "If you find for the plaintiff as against either or both of the defendants, it will

3. be necessary for you to fix the amount of the recovery, and in so doing you should deduct from the amount collected by said defendant, or defendants, whatever sum you find under the evidence the defendant or defendants are entitled to as attorneys' fees in said matter, and any other attorney's fee owing from the plaintiff to said defendant, or defendants, and any expenses incurred by said defendant, or defendants, if any there was, and make your verdict for the balance of said sum, after such deductions, with interest thereon at six per cent from the date of collections or conversion, until the present time."

4. It is evident that the appellants had a fair trial, and the judgment is therefore affirmed with ten per cent damages.

COMPUTING CHEESE CUTTER COMPANY
v. DUNN ET AL.

[No. 6,291. Filed April 30, 1909. Rehearing denied October 29, 1909. Transfer denied December 10, 1909.]

1. COMMERCE.—*Unfair Trade.—Deceit.*—No person has the right to represent his goods as those of another. p. 23.
2. TRADE-MARKS AND TRADE-NAMES.—*Similarity.—Deceit.—Injunction.*—Where a person or a corporation has assumed a name so similar to another that the business of the latter is being diverted, or is liable to diversion thereby, injunction will lie to prevent the use of such name by the former. p. 23.
3. FRAUD.—*Trade-Names.—Deceit.*—The use of a trade-name so similar to that of another that the public is deceived thereby, constitutes a fraud upon the person whose trade is thus despoiled. p. 24.
4. FRAUD.—*Elements.—Separation of.—Unfair Competition.*—The essence of unfair competition is fraud, and it is determined from a consideration of all the circumstances combined. p. 25.
5. TRADE-MARKS AND TRADE-NAMES.—*"Anderson Cheese Cutter Company."—Right to Use.*—The use of the trade-name "Anderson Cheese Cutter Company" cannot ordinarily be restrained, the

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local name "Anderson" being rightly used by any one, unless by long-continued use it has gained a secondary meaning, and the words "cheese cutter" being merely descriptive, may ordinarily be used by any one. p. 25.

6. **TRADE-MARKS AND TRADE-NAMES.**—*Exclusiveness.*—*Proprietary Rights.*—*Injunction.*—To restrain the defendant from using a certain trade-name it is not necessary for the plaintiff to establish an exclusive or proprietary right in the words used. p. 25.
7. **FRAUD.**—*Diversion of Mail.*—*Trade-Names.*—*Unfair Competition.*—A person or corporation whose mail is diverted to another because the latter, for fraudulent purposes, has adopted a similar trade name, has a right of action for fraud and may restrain the further use of such trade-name. p. 27.
8. **INJUNCTION.**—*Trade-Names.*—*Unfair Competition.*—*Complaint.*—A complaint by the "Computing Cheese Cutter Company" alleging that the defendants under the name of "Anderson Cheese Cutter Company" conspired to deprive the plaintiff of its business, that they "are deceiving the public and plaintiff's customers, thereby securing orders and profits intended for the plaintiff," and are wrongfully obtaining letters containing orders intended for the plaintiff, to plaintiff's damage, states a cause of action. Comstock, P. J., and Rabb, J., dissenting. p. 27.

From Madison Circuit Court; *John F. McClure*, Judge.

Suit by the Computing Cheese Cutter Company against Frank P. Dunn and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

Baggot & Pence, for appellant.

Kittinger & Diven, for appellees.

ROBY, J.—This appeal is taken from a judgment rendered against appellant upon its refusal to plead further after a demurrer for want of facts had been sustained to its complaint. The averments of that pleading show that on May 7, 1903, the appellant was incorporated under the law of this State, its name and address being Computing Cheese Cutter Company, Anderson, Indiana; that it took over and succeeded to the property and good-will of a partnership which was conducted under the same name, its business being the manufacture and sale of a machine or device known as a cheese cutter; that it has, at large expense, advertised

said machine throughout the United States and Canada, and has an extensive and profitable trade throughout said territory, a large part of which consists of orders forwarded through the mail; that, on account of its location and name, mail is addressed to it by other than its exact name, as "The Anderson Cheese Cutter Company," "The Anderson Cheese Cutter," "The Anderson Computing Cheese Cutter," "The Anderson Computing Cheese Cutter Company," "The Cheese Cutter Company of Anderson," "Cheese Cutter Company," as well as by its true and exact name "Computing Cheese Cutter Company," and the plaintiff was, on March 18, 1904, and prior thereto had been, and ever since said time has been, often addressed by its customers and the public generally throughout the United States and through the United States mails in all and each of said names, and the orders were, during all of said time, sent to said plaintiff by each and all of said names, and many and various sums of money were remitted to the plaintiff by each and all of said names by the medium of the United States mails; that its business was and is of great value on account of the advertisement and manufacture and sale of a machine which gives satisfaction to the purchasers and is popular with the trade; that the defendants in March, 1904, conspired together for the purpose of pirating plaintiff's business, and wrongfully depriving it of trade which would come to it by reason of its reputation and trade name; that they incorporated a company under the name of the "Anderson Cheese Cutter Company," and then and there engaged in the manufacture and sale of a cheese cutter, resembling plaintiff's machine in style and appearance, and, by means of such resemblance, the similarity of names and the identity of location, are deceiving the public and the plaintiff's customers, thereby securing orders and profits intended for the plaintiff; that defendants have demanded and are now demanding and receiving all mail which comes to the Anderson post-office addressed other than by plaintiff's true and exact name, and

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have thereby wrongfully obtained a large amount of business intended for plaintiff; that they are filling orders intended for plaintiff, and are answering its mail, whereby plaintiff has lost and is losing a large portion of its business and the profits thereof. Many other averments are made which need not be here noticed. The prayer is for an injunction and damages.

The law of trade-marks, trade-names and unfair competition has of late years been the subject of much judicial consideration. It would be useless to cite or review the

1. many cases involving infringement of trade-marks.

The sufficiency of the pleading under consideration depends upon whether its averments bring the case within the principle that nobody has any right to represent his goods as the goods of somebody else. *Seixo v. Provezende* (1866), L. R. 1 Ch. *192; *Reddaway v. Banham*, [1896] A. C. 199; *Sarlechner v. Apollinaris Co.*, [1897] 1 Ch. 893, 899; *Pillsbury-Washburn Flour Mills Co. v. Eagle* (1898), 86 Fed. 608, 41 L. R. A. 162, 166.

“When a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely re-

2. sembles that of a business rival, previously established, that the business of the latter is liable to be diverted and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed to the detriment of the older company.” *Plant Seed Co. v. Michel Plant, etc., Co.* (1889), 37 Mo. App. 313.

The question of the right to relief against the infringement of a trade name in a given case depends upon the circumstances surrounding the adoption and advertisement of the name complained of, as much as upon its similarity to that of the complainant. The question in every case is whether the defendant is in fact attempting to sell his goods

as the goods of some one else. When this fact is found, a basis for relief is established. The fact is to be found, as other facts, from the evidence, including therein all the relevant circumstances and conditions. Identity of name may not, in itself, be sufficient. A lack of identity in name will not always suffice to prevent the extending of relief to one whose trade is being stolen. "What degree of resemblance between the names or devices is sufficient to warrant the interference of a court in cases of this kind is not capable of exact definition. It is, and must be, from the very nature of the case, mainly a question of fact, to be determined by the circumstances appearing in each particular case. In general, it may be said, if the resemblance is such as to mislead purchasers or those doing business with the person or corporation using the name, who are acting with ordinary caution, this is sufficient." *Atlas Assur. Co. v. Atlas Ins. Co.* (1908), 138 Iowa 228, 112 N. W. 232, 15 L. R. A. (N. S.) 625. See, also *McLean v. Fleming* (1877), 96 U. S. 245, 24 L. Ed. 824; *Schmidt v. Brieg* (1893), 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; *California Fig Syrup Co. v. Improved Fig Syrup Co.* (1892), 51 Fed. 296; *Wirtz v. Eagle Bottling Co.* (1892), 50 N. J. Eq. 164, 24 Atl. 658.

The use of a similar name under such circumstances as to show an intention to deceive the public, and thereby to deprive another of his property, is in fraud of the per-

3. son whose property is thus despoiled. The fertility of man's invention in devising new schemes of fraud is so great that the courts of equity have declined the hopeless attempt of embracing in formula all varieties of form and color, reserving to themselves the liberty to deal with it under whatever form it may present itself. As new devices of fraud are invented, they will be met by new correctives. Kerr, *Fraud and Mistake* (2d ed.), 1.

When one is called upon to meet a charge of fraud (and that is the essence of unfair competition), he cannot segre-

gate the various items of evidence which are presented

4. and justify the fraud by his right to do them separately. A man has a right to trade horses, to praise his own horse, to dye the white foot black, to file teeth and to administer remedies for heaves, but it is necessary to exercise these undoubted "rights" with much circumspection, for otherwise, under certain circumstances, they justify, and indeed require, the inference of fraud.

Ordinarily the use of such a name as the one chosen by appellees—"The Anderson Cheese Cutter Company"—could

not be restrained. A word indicating the locality of

5. manufacture—as Anderson—may be used by any one who can truthfully do so (*Delaware, etc., Canal Co. v. Clark* [1871], 13 Wall. 311, 20 L. Ed. 581; *Elgin Butter Co. v. Elgin Creamery Co.* [1895], 155 Ill. 127, 40 N. E. 616; *Telephone Mfg. Co. v. Sumter Tel., etc., Co.* [1901], 63 S. C. 313, 41 S. E. 322), unless, by long-continued use by another, such word has gained a secondary meaning (*American, etc., Watch Co. v. United States Watch Co.* [1899], 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. 263; *Pillsbury-Washburn Flour Mills Co. v. Eagle, supra*; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* [1900], 179 U. S. 665, 45 L. Ed. 365, 21 Sup. Ct. 270). One company cannot gain the right to the exclusive use of words such as "cheese cutter," which are merely descriptive of the goods to which they are applied (28 Am. and Eng. Ency. Law [2d ed.], 369);

but an exclusive or proprietary right in words is not

6. necessary to obtain an injunction against unfair competition in trade by the deceptive use of such words. *Pillsbury-Washburn Flour Mills Co. v. Eagle, supra.*

In the last case cited it is said, quoting from *Kinney v. Basch* (1877), 16 Am. Law Reg. (N. S.) 596: "It has been urged upon the part of the defendants that geographical names cannot be the subject of a trade-mark; neither can numerals, which only serve to indicate the nature, kind and qual-

ity of an article. It is true that the cases cited by defendants sustain these propositions, but the later cases have proceeded upon different and more equitable principles in defining the grounds upon which courts of equity interfere in cases of this description. This interference, instead of being founded upon the theory of protection to the owners' trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals or symbols is adopted for the purpose of defrauding the public, the courts will interfere, and to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols. This doctrine is fully supported by the latest English cases."

A review of cases in which a similar contention to that of appellees was made is contained in *Pillsbury-Washburn Flour Mills Co. v. Eagle*, *supra*, and it does not seem necessary to do more than cite that case.

A petitioner trading as "Merchants' Detective Association" sought to restrain the use by respondents of the name "Detective Mercantile Agency," as being an infringement of his trade-name. Both parties were located on the same street near each other, and were engaged in the same business. It appeared that respondents by various means, were fraudulently seeking to deceive the public into believing that they were the petitioner, and had adopted his name, the better to enable them to carry out that purpose. The name adopted by respondents designated the business in which they were engaged, and in which any one else could engage, and it was therefore no legal infringement of the petitioner's name, since no one can exclusively appropriate a generic word of that character; but the court nevertheless reversed the decree of the lower court, sustaining a demurrer to the petitioner's bill, holding that a fraudulent purpose in adopting the name, coupled with illegal practices calculated to deceive the public into mistaking respondent's place of business for

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petitioner's, was sufficient ground to warrant equitable relief. *Merchants Detective Assn. v. Detective Mercantile Agency* (1887), 25 Ill. App. 250. The similar location gave virulency to that which in itself was harmless. Many illustrative cases will be found in the monographic note to *Atlas Assur. Co. v. Atlas Ins. Co.* (1908), 15 L. R. A. (N. S.) 625.

It is to the public interest that letters mailed to one person shall not be appropriated by another. The person whose valuable mail is thus diverted has a right to complain.

7. To divert an order for goods thus forwarded is quite as reprehensible as to invite an intending purchaser into the wrong store. One who takes the property of another by art and device must have a clear and undoubted legal defense when he comes to a court of conscience. The chancellor's inquiry goes to honesty of conduct. If appellees have conducted themselves as honest men no injunction lies. The evidence needs to be heard to determine the fact.

The complaint on its face shows cause for relief,

8. and the judgment is therefore reversed.

Watson, C. J., Myers and Hadley, JJ., concur.

DISSENTING OPINION.

COMSTOCK, P. J.—The allegations of the complaint characterize the acts of appellees as fraudulent, but there are no direct allegations of facts sufficient to constitute fraud. It must be presumed, in the absence of any averment of fact to the contrary, that the appellees have the right to manufacture the cheese cutter in question, and at Anderson.

A trade-mark must have some physical connection with the goods, so that the mark goes with the goods into the market. The same rule applies to trade-names. *Jay v. Ladler* (1888), 40 Ch. Div. 649; *Singer Mfg. Co. v. Wilson* (1876), 2 Ch. Div. 434; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* (1892), 142 Ill. 494; *Moxley Co. v. Braun & Fitts Co.* (1900), 93 Ill. App. 183; *St. Louis Piano Mfg. Co.*

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v. *Merkel* (1876), 1 Mo. App. 305; *Oakes v. St. Louis Candy Co.* (1898), 146 Mo. 391, 48 S. W. 467; 28 Am. and Eng. Ency. Law (2d ed.), 351, 352.

“It is a fundamental rule that terms merely descriptive of the goods or business to which they are applied cannot be exclusively appropriated as trade-marks or trade-names.” 28 Am. and Eng. Ency. Law (2d ed.), 369.

The same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names designating districts of country. Descriptive terms by long use may acquire in the minds of the public a secondary significance, and come to mean the goods of that particular person. In such cases others cannot use them in such manner as to state a falsehood in their secondary sense.

The word “computing” is the descriptive term used by appellant. It is not used by appellees. If it were, it, being only descriptive, could not be appropriated by one to his exclusive use.

An arbitrary name used by a party to designate the name of an article may be protected. The term “computing” is not arbitrary. Both appellant’s and appellees’ machines are so designated that any one can easily learn by whom they are made. The term “cheese cutter,” used by a particular person or corporation, cannot be so used to the exclusion of other manufacturers.

It appears that appellant and appellees are engaged in the manufacture of cheese cutters in Anderson, Indiana. Appellees use the name “Anderson” in their trade-name, the other does not. Appellees, in the use of the geographical name “Anderson,” not used in a fanciful sense, invade no right of appellant. *United States v. Roche* (1879), 1 McCrary (U. S.) 385; *Globe-Wernicke Co. v. Brown* (1903), 121 Fed 185; *Computing Scale Co. v. Standard, etc., Scale Co.*

(1902), 118 Fed. 965, 55 C. C. A. 459; *Sterling Remedy Co. v. Gorey* (1901), 110 Fed. 372; *Hostetter Co. v. Martinoni* (1901), 110 Fed. 524; *Shaver v. Heller & Merz Co.* (1901), 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; *Wells & Richardson Co. v. Siegel, Cooper & Co.* (1900), 106 Fed. 77; *Hansen v. Siegel, Cooper & Co.* (1900), 106 Fed. 691; *Williams v. Mitchell* (1901), 106 Fed. 168, 45 C. C. A. 265; *Fulmer v. Huff* (1900), 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; *Searle & Hereth Co. v. Warner* (1902), 112 Fed. 674, 50 C. C. A. 321; *Dadirrian v. Yacubian* (1900), 98 Fed. 872, 39 C. C. A. 321; 28 Am. and Eng. Ency. Law (2d ed.), 371.

The trade-mark or trade-name must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. *Delaware, etc., Canal Co. v. Clark* (1871), 13 Wall. 311, 323, 20 L. Ed. 581.

That persons, not knowing the true name of appellant corporation, address it by an entirely different name—the name selected by appellees—cannot deprive appellees of the right to use the name it has assumed. It is only where the adoption or imitation of what is claimed to be a trade-mark or trade-name amounts to a false representation, express or implied, that there is any room for relief against such use.

It was said in *Delaware, etc., Canal Co. v. Clark, supra*, at page 327: "True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers

may be mistaken, but they are not deceived by false representation, and equity will not enjoin against telling the truth."

Eliminating the conclusions of the pleader, recitals and characterizations, fraud, misrepresentation and deceit of the public are not directly charged. It appears only that appellee corporation, under the name of "The Anderson Cheese Cutter Company," is engaged in the manufacture, at Anderson, Indiana, of a cheese cutter. Fraud cannot be predicated upon acts which the party charged has the right by law to do, whatever may be his motive, design or purpose. *Franklin Ins. Co. v. Humphrey* (1879), 65 Ind. 549, 560, 32 Am. Rep. 78; *Coppage v. Gregg* (1891), 127 Ind. 359, 362.

The words "cheese cutter" are a generic term. The word "Anderson" is a geographical term. No one is entitled, in the absence of fraud, to the exclusive use of either. The right to make, and, without fraud, to sell the machine cannot be questioned. If appellees have the right to carry on the business, they have the same right as appellant, under like circumstances, to receive through the United States mails letters or orders which they have reason to believe are intended for them. The court could not determine in advance for whom a letter or order is intended, when it is not correctly addressed to the person by whom it may be claimed.

The judgment should be affirmed.

Rabb, J., concurs in dissenting opinion.

KUNSE v. KNIGHTS OF THE MODERN MACCABEES.

[No. 6,603. Filed December 14, 1909.]

1. **INSURANCE.—Mutual Benefit Societies.—Suicide Clauses.—Sane or Insane.**—A mutual benefit certificate providing that "no benefit shall be paid in case the member commits suicide, within five years, whether sane or insane," does not insure against hanging while insane. p. 33.

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2. **INSURANCE.—Policies.—Conditions.—Suicide.**—Mutual benefit associations have the right to exclude from their risks liability for self-destruction, sane or insane. p. 35.

From Miami Circuit Court; *Frank D. Butler*, Judge *pro tem*.

Action by Margaret J. Kunse against the Knights of the Modern Maccabees. From a judgment for defendant, plaintiff appeals. *Affirmed*.

J. A. Shunk and *T. W. Anabal*, for appellant.

J. B. McIlwain and *Adam E. Wise*, for appellee.

WATSON, J.—This action was instituted in the lower court by the appellant, as the widow and duly designated beneficiary of Joseph B. Kunse, deceased, to recover \$500, the amount of the benefit certificate issued by the appellee upon the life of said decedent. Said association agreed to pay to the duly designated beneficiary one assessment upon its membership not exceeding \$500, \$1,000, \$1,500 or \$2,000 as he may elect in his application for membership. The appellee enacted by-laws, among them being the following, which was in force at the time the insured became a member and continued to be at the time of his death.

“Section 78. No benefits shall be paid on account of the death or disability of a member while engaged in a mob, riot or insurrection, * * * or when death was the result of suicide within five years after admission to life benefit membership, or when the death of such a member was intentionally caused by the beneficiary or beneficiaries of such member, and in all cases where death results from suicide within five years after admission to life benefit membership, whether member was sane or insane at the time of death, the beneficiary or beneficiaries of the member shall only be paid the amount of money which the member has paid into the life benefit fund, which amount shall be the full amount which shall be claimed in any such case; provided that no benefit certificate of any member shall be invalid where the member has been adjudged insane, prior to his death, by any court of competent jurisdiction.”

The insured departed this life on June 27, 1906, and thereafter the appellant made due proof of his death to appellee, who stated the insured came to his death by suicidal hanging. The appellee refused to pay to appellant the sum of \$500 provided for in said benefit certificate, but tendered her its check for \$8.75, the amount claimed by appellee to have been paid into its life benefit fund by the insured, which appellant refused to accept.

The complaint was in one paragraph, based upon a benefit certificate issued by the appellee to said decedent, to which complaint the appellee filed its answer in two paragraphs. The first was a general denial, and the second averred that said appellee was a corporation duly organized under the laws of the State of Michigan, and sought to avoid liability under said benefit certificate by setting out section seventy-eight of the by-laws of the said company, before quoted; that said decedent came to his death by suicide, in violation of said by-laws; that said beneficiary reported the death of said decedent to appellee, which showed that Joseph B. Kunse came to his death from suicide by hanging, within one year after becoming a member of said association; that said decedent had contributed, during his membership, the sum of \$8.75, for which sum appellee had theretofore forwarded a draft to Margaret J. Kunse, widow, in payment of said dues, which draft she had received and returned to appellee.

To this second paragraph of answer the appellant addressed a demurrer for want of facts, which was overruled and exceptions taken. Appellant replied to said second paragraph of answer in two paragraphs. The first admitted that the assured, Joseph B. Kunse, came to his death by hanging himself, but averred that he was forced to do so by an "irresistible, insane impulse," and that the act was "wholly involuntary, unintentional and accidental;" that he was "wholly insane and totally incapable of forming an intention to take his own life," and that his death was the immediate result

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of "such insane frenzy which he was powerless to resist." The second paragraph admitted Joseph B. Kunse came to his death by hanging himself, but averred that the assured was insane prior to and at the time of his death, and was so adjudged and found to be insane by David C. Ridenour, coroner of Miami county, Indiana, who investigated how and in what manner the assured came to his death, and made the following finding: "I, David C. Ridenour, coroner of said Miami county, having examined the body of Joseph B. Kunse, and having heard the testimony of witnesses, which said testimony is hereto attached, do hereby find that said decedent came to his death on June 27, 1906, at, about, or between the hours 4 and 4:45 o'clock p. m., in a barn of the Huffman property, corner of Fifth and Wabash streets, in Peru, Miami county, Indiana; that said death was caused by strangulation from suicidal hanging, following or as a result of a demented mind."

To each of these paragraphs of reply the appellee filed a demurrer for want of facts, which demurrers were sustained and exceptions saved, whereupon appellant refused to plead further and judgment was rendered upon said demurrers.

The errors relied upon for reversal are: (1) The overruling of appellant's demurrer to appellee's second paragraph of answer; (2) the sustaining of appellee's demurrer to each paragraph of appellant's reply; (3) the sustaining of appellee's motion for judgment.

The ruling on the several demurrers at the last analysis brings us to the proposition whether a beneficiary can recover upon a policy of a society which had incorpo-

1. rated in its by-laws, at the date of the policy, that "no benefit shall be paid in case the member commits suicide, within five years, whether sane or insane." It is averred in the answer and admitted by the appellant that the assured committed suicide by hanging, but it is claimed he was forced to do so by an insane frenzy which he

was powerless to resist. The contention of the appellant is that the policy is not avoided by the terms thereof and the by-laws of the association, if the assured did not understand the physical nature of his act. We are, however, unable to reach the conclusion that the decedent did not know that death would follow from hanging, or that he did not do just what he intended to do. But this association, in the absence of any law to the contrary, had the right to make such a contract as was made, and to provide against liability under the policy if the assured should come to his death by self-destruction, whether he was sane or insane. The language is plain and unambiguous, and means just what it says. *Union Central Life Ins. Co. v. Hollowell* (1896), 14 Ind. App. 611; *Union Mut. Life Ins. Co. v. Payne* (1900), 105 Fed. 172, 45 C. C. A. 193; *Dennis v. Union Mut. Life Ins. Co.* (1890), 84 Cal. 570, 24 Pac. 120; *Sargeant v. National, etc., Co.* (1899), 189 Pa. St. 341, 41 Atl. 351; *Supreme Commandery, etc., v. Ainsworth* (1882), 71 Ala. 436, 46 Am. Rep. 332; *Sabin v. Senate of the National Union* (1892), 90 Mich. 177, 51 N. W. 202; *Douglas v. Knickerbocker Life Ins. Co.* (1881), 83 N. Y. 492; *Seitzinger v. Modern Woodmen, etc.* (1903), 204 Ill. 58, 68 N. E. 478; *Spruill v. Northwestern Mut. Life Ins. Co.* (1897), 120 N. C. 141, 27 S. E. 39; *Brower v. Supreme Lodge, etc.* (1898), 74 Mo. App. 490; *Johns v. Northwestern Mut. Relief Assn.* (1895), 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; *Hart v. Modern Woodmen, etc.* (1899), 60 Kan. 678, 57 Pac. 936, 72 Am. St. 380; *Clarke v. Equitable Life, etc., Society* (1902), 118 Fed. 374, 55 C. C. A. 200; *Bigelow v. Berkshire Life Ins. Co.* (1876), 93 U. S. 284, 23 L. Ed. 918; *Billings v. Accident Ins. Co.* (1892), 64 Vt. 78, 24 Atl. 656, 17 L. R. A. 89, 33 Am. St. 913; Vance, Insurance, p. 522; 2 Bacon, Benefit Soc. (3d ed.), §336.

In the case of *Clarke v. Equitable Life, etc., Society, supra*, the court construed the condition, and held that the provi-

sion, "self-destruction, sane or insane," was a risk not
2. assumed by the society in the contract. In that case
the evidence showed the insured shot himself in the
head with a pistol. Plaintiffs, in their replication admitting
the shooting, averred that the mind of the assured "was so
impaired and affected by insanity that he was not conscious
of the physical nature and consequences of the act he com-
mitted, and did not intend to cause his death, but was moved
to commit said act by irresistible impulse." The court sus-
tained a demurrer to the replication, which ruling, on ap-
peal, was sustained by the circuit court of appeals. In sus-
taining said appeal the court said: "If it was an open ques-
tion, there is much to be said of the injustice of contracts of
this nature, for a person ought no more to be held responsi-
ble for the loss of his life when taken by himself under the
ravings of delirium, or impelled by the hallucinations of mel-
ancholy, than if he dies from an ordinary disease, or from
an accident; but that question is not before us, and it seems
to be well settled that insurance companies may avoid alto-
gether this class of risks, and that, being at liberty to stipu-
late against hazardous occupations, unhealthy climates, or
deaths from consumption or other excepted diseases, they
may also contract not to assume a risk of a certain mode of
death, and presumably the premiums are calculated on the
elimination of that risk. If the assured is informed, in apt
words, of the extent of the limitation, it is not perceived that
there is any good reason why such contract should not be
governed by the same rules of interpretation which control
courts in all other cases of contract, and why plain and un-
ambiguous words should be frittered away by casuistry and
refinement."

We quite agree with the reasoning in the quotation just
given; but, it being admitted that the assured died by his
own act, and governed as we are by the plain language of
the contract, we must conclude that the association did not
assume the risk of self-destruction.

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The trial court did not commit error in its ruling upon the several demurrers.

Judgment affirmed.

REXROTH ET AL. v. HOLLOWAY.

[No. 6,600. Filed December 14, 1909.]

1. WORDS AND PHRASES.—“*Necessary*.”—The word “necessary” may import indispensably requisite, needful, appropriate, reasonable for the purpose, convenient, useful, suitable, or inevitable, but its true meaning must be determined from the circumstances in which it is used. p. 37.
2. WORDS AND PHRASES.—“*Reasonable*.”—The word “reasonable” imports appropriate, necessary, ordinary, or usual under the circumstances, and always implies the exercise of good faith and a sound discretion. p. 38.
3. MASTER AND SERVANT.—*Liability to Third Persons*.—The master is liable to third persons injured by the wrongs of his servant acting within the scope of his employment, though the particular act was not authorized. p. 39.
4. MASTER AND SERVANT.—*Scope of Employment*.—*Wrongful Acts*.—Wrongful acts committed by a servant in doing the thing authorized by the master subjects such master to liability therefor. p. 41.
5. MASTER AND SERVANT.—*Bailment*.—*Injuring Horse*.—*Scope of Employment*.—A company whose traveling salesman hired a horse to drive to Niles (ten miles away), and he drove to Buchanan (fourteen miles away), thereby fatally injuring the horse, is liable therefor, where the master’s business required the salesman to go to Buchanan. p. 41.

From Laporte Circuit Court; *John C. Richter*, Judge.

Action by John H. Holloway against Charles M. Rexroth and another. From a judgment for plaintiff, defendants appeal. *Affirmed*.

F. J. Lewis Meyer, for appellants.

Anderson, Parker & Crabill, for appellee.

HADLEY, J.—Appellant Rexroth was a traveling salesman for appellant Humiston, Keeling & Co. In the course of his employment he was required to go to Buchanan, Michigan,

to call on customers of his employers. He hired a horse from appellee, saying that he desired to drive to Niles; that he was going there in the interest of his employers. Niles was about ten miles away, while Buchanan was about fourteen miles away. Instead of going to Niles, he went to Buchanan, overdrove the horse and overwatered him, and by reason thereof the horse died on the following day. Appellee sued appellants to recover damages for the loss of said horse.

The only question presented is whether, to fix the liability for the injury on the master (Humiston, Keeling & Co.), appellee was required to prove that the hiring of the

1. horse was necessarily incident to the performance of his master's business, or reasonably incident thereto.

It seems to us that this is a quibble as to terms. Appellants have cited to us decisions where the term "necessarily incident," in this connection in similar cases, is used. *American Tel., etc., Co. v. Green* (1905), 164 Ind. 349; *Davis v. Talbot* (1894), 137 Ind. 235; *Cleveland, etc., R. Co. v. Closser* (1890), 126 Ind. 348, 9 L. R. A. 754, 22 Am. St. 593; *Howe Machine Co. v. Ashley* (1877), 60 Ala. 496. Appellee has cited decisions where the term "reasonably incident" is used. *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 52 Am. Rep. 675; *Oakland City, etc., Society v. Bingham* (1892), 4 Ind. App. 545; 1 Jaggard, Torts, p. 258.

The word "necessary" has no fixed character peculiar to itself. It admits of all degrees of comparison. *McCulloch v. Maryland* (1819), 4 Wheat. *316, 4 L. Ed. 579; *Moale v. Cutting* (1883), 59 Md. 510. It may sometimes mean "indispensably requisite," at others "needful," at others "incident" or "conducive to." *Chambers v. City of St. Louis* (1860), 29 Mo. 543. It is sometimes used to express expediency or appropriateness. *Getchell & Martin Lumber, etc., Co. v. Des Moines, etc., R. Co.* (1901), 115 Iowa 734, 87 N. W. 670.

It is sometimes used to express that which is reasonable for the purpose required (*Mobile, etc., R. Co. v. Alabama*,

etc., *R. Co.* [1888], 87 Ala. 501, 6 South. 404; *In re Rhode Island, etc.*, *R. Co.* [1901], 22 R. I. 457, 48 Atl. 590; *Mayor, etc.*, v. *Chesapeake, etc.*, *Tel. Co.* [1901], 92 Md. 692, 48 Atl. 465), or that which is reasonably convenient under the circumstances (*Kelly v. People's Transportation Co.* [1870], 3 Ore. 189; *St. Louis, etc.*, *R. Co. v. Trustees, etc.* [1867], 43 Ill. 303). It is sometimes given the meaning of that which is useful and suitable, or needful and conducive to, or expedient or convenient, for the purpose required. *Board, etc.*, v. *Iseberg* (1900), 10 Okla. 378, 61 Pac. 1067; *Commissioners, etc.*, v. *Moesta* (1892), 91 Mich. 149, 51 N. W. 903; *Jerome v. Ross* (1823), 7 Johns. Ch. *315, 11 Am. Dec. 484; *Aurora, etc.*, *R. Co. v. Harvey* (1899), 178 Ill. 477, 53 N. E. 331. There are cases which hold that the word "necessary" means "indispensably requisite," "inevitable" or "not to be avoided." *Lockwood v. Mildeberger* (1899), 159 N. Y. 181, 53 N. E. 803; *Town of Oldtown v. Dooley* (1876), 81 Ill. 255; *Hitch v. United States* (1895), 66 Fed. 937; *Stevenson v. State* (1885), 17 Tex. App. 618; *State, ex rel., v. Mayor, etc.* (1894), 39 Neb. 745, 58 N. W. 442; *English v. Reed* (1895), 97 Ga. 477, 25 S. E. 325. But in the cases from different tribunals, giving these various definitions, there is little, if any, actual conflict, and from them it is made clear that the word "necessary" must be considered in the connection in which it is used; that it is a word susceptible of various meanings; that it may import absolute physical necessity or inevitability, or that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought. *Mayor, etc.*, v. *Chesapeake, etc.*, *Tel. Co.*, *supra*; *McCulloch v. Maryland*, *supra*.

"Reasonable" is a term difficult of definition, and usually it must be considered with the facts of the particular controversy in determining its force and latitude. *In*

2. *re Nicc & Schreiber* (1903), 123 Fed. 987. It is sometimes used to express that which is appropriate and necessary (*Levering v. Union, etc., Ins. Co.* [1867], 42 Mo.

88, 97 Am. Dec. 320); it includes good faith and the exercise of a sound discretion (*Dearborn v. Batten* [1888], 64 N. H. 568), and it imports what is ordinary or usual under the circumstances of the case. *Reed v. Missouri, etc., R. Co.* (1902), 94 Mo. App. 371, 68 S. W. 364; *Geno v. Fall Mountain Paper Co.* (1895), 68 Vt. 568, 35 Atl. 475.

With these definitions of terms, we come to consider the established rules as to the liability of a master for the torts of the servant. The general rule is, "that which the

3. superior has put the inferior in motion to do, must be regarded as done by the superior himself, * * *

and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious. * * * The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond." Cooley, Torts (2d ed.), pp. 625, 626.

"It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged, when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of

passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." Cooley, Torts (2d ed.), pp. 630, 631, quoting from *Rounds v. Delaware, etc., R. Co.* (1876), 64 N. Y. 129. See, also, *Mott v. Consumers Ice Co.* (1878), 73 N. Y. 543; *Ochsenbein v. Shapley* (1881), 85 N. Y. 214.

The wrong need not be an intentional one, and even if the servant, in committing the injury, neglected some word of caution or instruction of the master, the master will not be exempt. *Oakland City, etc., Society v. Bingham, supra.* In such case, there may be no moral wrong attributable to the managing officers, "but the fact remains that in the management of their own business through agents an injury has been inflicted on others. That they trusted a servant who has ventured to disobey instructions is their misfortune, but it ought not also to be the misfortune of others who had no voice in his selection, and who had no concern in the question who should manage the company's business beyond the common concern of all the public that it should not be managed to their injury." Cooley, Torts (2d ed.), p. 633. "The powers of the agent are, *prima facie*, coëxtensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.'" *American Tel., etc., Co. v. Green* (1905), 164 Ind. 349.

"If the principal holds out an agent or servant as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearance so created, the principal may, in such a case as this, be bound by the acts of the apparent agent within the scope of his ostensible authority, although as between the agent and his employer no such authority in fact existed." *Over v. Schiffing* (1885), 102 Ind. 191.

"To undertake to lay down a general rule applicable to all cases would not only be difficult, but impossible. But

we think this much may be said, where a servant is
 4. engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed were outside of his authority, and against the express orders of the master." *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 52 Am. Rep. 675. See, also, 2 Thompson, Negligence, p. 889, §6; Wood, Master and Servant, pp. 593, 594.

Where a master employs one in a vocation, requiring him to act under certain conditions and commits to his discretion the duty of determining when and what action may be necessary, the employer will be responsible for the misjudgment, as well as the misconduct, of the servant, and if he acts when there is no occasion for it at all, though intending to accomplish some end of the employment, such responsibility will still exist. *Oakland City, etc., Society v. Bingham, supra*; *Levi v. Brooks* (1877), 121 Mass. 501; *Johnson v. Barber* (1849), 10 Ill. 425, 50 Am. Dec. 416.

In case of doubt, the test may well be whether he was acting *bona fide* in furtherance of the master's interest. Cooley, Torts (2d ed.), p. 628; *Birmingham Water-Works Co. v. Hubbard* (1887), 85 Ala. 179, 4 South. 607, 7 Am. St. 35.

Under these rules, it is clear that the words "necessary," or "necessarily," as used in the authorities cited by appel-

lant, should not be interpreted in the strict sense of

5. indispensable, unavoidable or requisite, but in the broader sense of appropriate, usual or convenient.

To hold otherwise would place these decisions in direct conflict, in principle, with a long and unbroken line of authorities. Giving the words this interpretation, the difference in their meaning from "reasonable," or "reasonably," if

any, is so slight as to be wholly immaterial and insubstantial.

To hold that the master could be held liable for the tort of his servant only while engaged in an act necessarily incident to his employment, and give the word "necessarily" the strict definition of the term, would practically free the master from liability; since it is seldom that a servant commits a tort, while performing an act that is indispensable or unavoidable, in the performance of the principal act he is set to do.

Here the principal act required of appellant Rexroth was to go to Buchanan. He could go by train, he could go by horse and buggy, or he could walk. No one was necessary in the sense of being indispensable, inevitable or unavoidable. Either of the first two surely would be necessary in the sense of being appropriate, usual or reasonable. We find no reversible error in the record.

Judgment affirmed.

INDIANAPOLIS AND MARTINSVILLE RAPID TRANSIT COMPANY v. WALSH.

[No. 6,814. Filed December 14, 1909.]

1. CARRIERS.—*Interurban Railroads.—Sudden Starting.—Complaint.*—A complaint alleging that the defendant interurban railroad company stopped its car at a regular station for passengers, that the plaintiff attempted to alight, and that as she was in the act of alighting the defendant started its car with a sudden jerk, thereby throwing her to the ground, to her damage, states a cause of action, and shows that the car was stopped. p. 44.
2. CARRIERS.—*Passengers.—Interurban Railroads.—Stations.—Presumptions.*—Passengers have the right to assume that when an interurban car stops at a regular passenger station they may safely alight. p. 45.
3. WITNESSES.—*Cross-Examination.—Limits of.—Injuries.—Evidence.*—It is not erroneous for the trial court to refuse to permit defendant to inquire on cross-examination as to plaintiff's decla-

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- rations concerning her injuries, where the witness had been asked in chief only as to the color of plaintiff's skirt. p. 46.
4. EVIDENCE.—*Declarations of Pain.—Interurban Railroads.*—Evidence of plaintiff's declarations of pain made to the witness on her second visit to plaintiff, is admissible. p. 46.
 5. EVIDENCE.—*Declarations.—Bias.—Offer of Proof.*—Evidence of witness's refusal to tell the defendant's attorney what the plaintiff said upon a certain occasion, and that the witness instructed his wife not to inform defendant's attorney thereof, is inadmissible, where there was nothing to show that the plaintiff's declarations concerned the subject-matter of the litigation. p. 47.
 6. APPEAL.—*Instructions.—Exceptions.*—Where no exception is taken to the giving of an instruction, no question thereon can be raised on appeal. p. 48.
 7. EVIDENCE.—*Right of Others to Ride on Train.—Immateriality.*—In an action by the plaintiff for personal injuries sustained in alighting from defendant interurban railroad company's car, evidence as to another's right to passage to another point, and of another's payment of fare, is wholly irrelevant. p. 48.
 8. APPEAL.—*Instructions.—How Made Part of Record.—Statutes.*—Instructions can be made a part of the record by statute (§561 Burns 1908, Acts 1907, p. 652) only by fulfilling the statutory requirements. p. 48.
 9. APPEAL.—*Instructions.—Making Part of Record under Statute.—Requirements.*—Under §561 Burns 1908, Acts 1907, p. 652, instructions, to be a part of the record, must be signed by the party, or his attorney, and a memorandum made and signed by the judge showing those given and those refused, proper exceptions taken, and an order-book entry made of the filing thereof. p. 49.
 10. APPEAL.—*Instructions.—Questioning.—Record.*—Questions on instructions cannot be raised on appeal, unless such instructions are brought into the record. pp. 49, 50.
 11. APPEAL.—*Instructions.—Record.*—Instructions properly signed by the judge and filed constitute a part of the record. p. 50.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by Hallie Walsh against the Indianapolis and Martinsville Rapid Transit Company. From a judgment on a verdict for plaintiff for \$2,500, defendant appeals. *Affirmed.*

Brill & Harvey, and *W. H. Latta*, for appellant.

Morris & Newberger, and *Otis E. Gulley*, for appellee.

RABB, P. J.—The appellant owns and operates an inter-urban electric railway between the city of Indianapolis and the city of Martinsville. Appellee was a passenger on one of its cars from Indianapolis to Mooresville, a town on its line. She claims to have been injured by the negligence of the appellant in starting its car, with a sudden jerk, while she was in the act of alighting therefrom, at one of its regular stations, where the car had stopped, thereby throwing her to the ground. This action is brought to recover damages for said alleged injury.

Appellant's demurrer to the complaint was overruled, issues were formed, a jury trial had, resulting in a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict.

The questions presented in this appeal relate to the action of the court in overruling appellant's demurrer to the complaint, and its motion for a new trial.

After the formal allegations relating to appellant's business, and appellee's taking passage on appellant's car, the complaint contains these allegations: "That when

1. said car, upon which plaintiff had so become a passenger, reached said town of Mooresville, it was stopped by the motorman and conductor, employes of said defendant, then and there in charge and control thereof, at a place therein provided by defendant as a regular stopping place for passengers to alight from and board its cars;
* * * that when said car had so reached and stopped at said point in said town of Mooresville, as alleged, plaintiff immediately and without unreasonable delay, arose from her seat therein, passed to said rear platform thereof, leading her child, and carrying some baggage she had with her, for the purpose of alighting therefrom; that upon reaching said platform, and handing her baggage to her sister, who had already alighted, plaintiff immediately and without unreasonable delay stepped to the lower step thereof, on the right hand or west side of said car, leading to said cinder

walk or platform, and was in the act of stepping from said lower step to said cinder walk or platform, when said motor-man and conductor, so in charge of said car, negligently and carelessly started the same forward, with a sudden movement, while the plaintiff was in such perilous position, attempting to alight therefrom, and without giving her any warning, thereby jerking and swinging plaintiff around, and throwing her to the ground.”

The criticism urged against the complaint is that it does not charge that said car had stopped at said point for allowing the plaintiff or other passengers to alight, or that the plaintiff knew it was a regular stopping place, or acted upon the assumption that it was such stopping place, or that any invitation was extended to the plaintiff to alight, or that the car was standing still at any or all times after she arose from her seat, and that from all that appears in the complaint the sudden movement forward of the car may have been simply an acceleration of speed.

None of the objections urged against the complaint are well founded. It was unnecessary to aver in the complaint

that the car stopped to allow passengers to alight, if

2. the point where it stopped was a regular stopping place. The passengers had a right to assume that it stopped for the purpose for which the place was provided. Nor was it necessary to set forth with more clearness than was shown the fact that appellee acted upon the assumption that the car was stopped for the purpose of allowing passengers to alight therefrom. No further invitation was needed to be extended to passengers who desired to alight at a regular stopping place on appellant's line, than for the car to stop. We think it does clearly appear from the averments of the complaint that the car was stationary from the time appellee arose until it is alleged she stepped from the car upon the lower step preparatory to leaving the car. It would require a very ingenious mind, indeed, to give to the complaint the interpretation contended for by appellant.

To a person of just "common understanding," its meaning is very plain.

Appellant's motion for a new trial presents a multitude of questions. The first one suggested by appellant relates

to the refusal of the court to permit appellee's witness, Grace Morgan, to answer the following questions, on cross-examination: "Q. Did Mrs. Walsh claim that she had been injured, in any way, in the hip at that time? Q. I will ask you to state if it is not a fact that she did not claim to have been hurt in the hip or in the thigh at all at that time; made no complaint whatever? Q. I will ask you if she did not state this in substance, that she got tangled in her skirts and fell to the ground, and she threw the grip which she had to the ground, and got up quickly, and got the child off, before the car got away? Did she not state that, or that in substance, in your presence, Mrs. Morgan?"

The only fact elicited by appellee's counsel from this witness in her examination-in-chief, was that, on the day of the alleged accident, witness observed the appellee's skirt, and that it was all black, and that appellee said to witness, "Just look at my skirt." This expression was a voluntary one on the part of the witness, not called for by any interrogatory. Nothing was asked by appellee's counsel with reference to what appellee said on that occasion, and the witness undertook to give no conversation. It was entirely competent for the appellant to show anything said by the appellee that would tend to disprove her case, but such statements could not be elicited by a cross-examination of appellee's witness, who in her examination-in-chief had testified simply to her own observations of a physical fact or condition.

Complaint is made that the court erred in permitting the appellee to submit this interrogatory to her witness,

4. Kate Morgan: "Tell the jury what those complaints were that she made." This witness had already tes-

tified that the plaintiff had made complaints of pain on her second visit to the appellee. The answer to the interrogatory was as follows: "The greatest complaint was her ankle and her hip." Complaints of this kind, made by the injured party, are competent evidence. *Indianapolis St. R. Co. v. Whitaker* (1903), 160 Ind. 125.

It is next complained that the court erred in sustaining appellee's objection to the following question, asked Rooker

Morgan, appellee's witness, on cross-examination, by

5. the appellant: "I will ask you if at the noon adjournment I did not ask you and your wife to state to me what Mrs. Walsh said to you in your presence and hearing on the occasion that you have testified that she was at your house, and if you did not decline, and instruct your wife to decline to tell me what she said?" It is insisted that the appellant was entitled to an answer to this question, for the reason that if it was answered in the affirmative, it would tend to show bias and prejudice on the part of the witness, and would go to affect the weight and credibility of his testimony. No error intervened in sustaining the objection to this question. It was not shown in the interrogatory that the inquiry addressed to the witness and his wife related to what Mrs. Walsh said in reference to the subject-matter of the litigation. They had no right to inquire generally into Mrs. Walsh's conversation on any occasion, unless it related to the subject of the lawsuit. If they had inquired of the witness, what, if anything, Mrs. Walsh said in reference to her injury, or in reference to the accident, out of which the lawsuit grew, and the witness had declined to answer, it might have been competent, but in the form in which it was put, it was clearly incompetent.

Complaint is made of the refusal of the court to permit William Tichnor to answer a question addressed to him with reference to the same inquiry made by appellant's counsel of the witness Rooker Morgan, and the objection was properly sustained for the same reason.

It is objected that the court erred in giving to the jury the twenty-third instruction, given by the court on its own motion. No question is presented. No exception was taken to the giving of the instruction complained of.

It is insisted that the court committed error in sustaining the objections to the following questions addressed to appellant's witness, Albert Morgan: "Q. You may state whether or not there was any person on there that was not entitled to ride beyond this railroad crossing? Q. I will ask you if any one had paid a fare that would permit him to ride any further than the railroad crossing?" No error intervened in this ruling, as it was irrelevant to the issue, immaterial, and the first question called for a legal opinion from the witness.

Complaint is made that the court refused to give certain instructions requested by appellant, and that it gave certain ones claimed to have been requested by the appellee. The instructions are not brought into the record by a bill of exceptions. Appellant undertakes to bring them in under the provisions of §561 Burns 1908, Acts 1907, p. 652.

Much of the proceedings in the trial of an action in court, including instructions given to the jury, do not ordinarily belong to the record of the cause made by the court. If it is desired to bring any action had by the court, or anything transpiring in the course of the trial, that does not properly belong to the record, into the record for any purpose, it is usually necessary to do this by a proper bill of exceptions, and by such bill everything that transpires in the history of the case, in the process of its passing through the court, may be made part of the record. The section of the code referred to provides a simpler method of bringing into the record the action of the trial court with reference to instructions to the jury; but in order to entitle instructions given or refused to a place in the record, under the provisions of

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this section they must be identified and authenticated in the manner provided by law.

Instructions requested must be authenticated and identified by the signature of the party or his attorney requesting them, and by a memorandum made by the judge

9. of the number of those given and those refused, and this attested by his signature, and when so identified and attested, such instructions become a part of the record by simply filing them with the clerk. Unless so attested, they can only become part of the record by a proper bill of exceptions. *Speck v. Kenoyer* (1905), 164 Ind. 431; *Baker v. Gowland* (1906), 37 Ind. App. 364; *Petrie v. Ludwig* (1908), 41 Ind. App. 310; *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348; *Mace v. Clark* (1908), 42 Ind. App. 506.

The transcript before us recites that appellant requested the court to give certain instructions to the jury. The request is set out, as are the instructions, all of which are properly numbered, and the transcript recites that these instructions were filed at the close of the instructions given, but not one of these instructions was signed by the appellant or its counsel, nor are they authenticated by the memorandum required by the statute indicating the number of those given and those refused, signed by the judge; hence they have no legitimate place in the record, and are not presented for our consideration.

The transcript recites that the appellee requested the court to give to the jury instructions numbered from one to four, inclusive, and the written request of appellee

10. is copied into the transcript, but the instructions numbered one to four do not appear.

The transcript also recites that the court on its own motion gave to the jury instructions numbered one to eight, inclusive, but no set of instructions answering this description appears in the record.

The only instructions properly appearing in the record are the instructions given to the jury. These are numbered from one to twenty-six, inclusive, and include two

11. numbered twenty-three. These instructions are properly signed by the judge, are filed, and are a part of the record, and must be treated as the instructions given by the court on its own motion, and are the only instructions of which this court can take cognizance.

At the close of the instructions, the appellant excepted to the giving of instructions one, two, three and four, 10. of the instructions tendered by appellee. No such instructions appearing in the record, no question is presented.

No error appearing in the record, the judgment of the court below is affirmed.

TENNYSON v. FLEENER ET AL.

[No. 6,902. Filed December 14, 1909.]

1. **REFORMATION.**—*Deeds.*—*Covenants.*—*Breach.*—In an action for damages for a breach of covenant, the defendant praying for, and securing a reformation of the deed whose covenants are declared upon, such breach must be considered as relating only to the deed as reformed. p. 51.
2. **DAMAGES.**—*Breach of Covenant.*—*Deeds.*—*Reformation.*—In an action for damages for a breach of covenant in a deed covering, by mistake, certain land not owned by the grantor, damages being given only for the value of such land so included by mistake, such damages cannot be sustained, where the court decreed a reformation of such deed so as not to cover such land. p. 51.
3. **COVENANTS.**—*Breach of.*—*Complaint.*—*Denial.*—*Reformation.*—An action for breach of covenant, answered by a general denial, may be wholly defeated by an affirmative pleading praying a reformation of the deed so as to exclude that part of the land about which the contest arose. p. 51.

From Warriek Circuit Court; *Roscoe Kiper*, Judge.

Action by William Fleener and another against James F. Tennyson. From a judgment for plaintiffs, defendant appeals. *Reversed.*

Gough & Gough, for appellant.

S. B. Hatfield, F. H. Hatfield and W. S. Hatfield, for appellees.

ROBY, J. — The court upon request made a special finding of facts and stated conclusions of law thereon. The

facts found are, in substance, that the appellant who

1. was defendant below, contracted to sell to appellees his farm, except six acres off the east end thereof, and that by mutual mistake of the parties the description contained in the deed executed in consummation of said contract included land not owned by appellant and not sold or intended to be sold to appellees. The land included in the boundaries set out in said deed and not owned by appellant or taken into possession by appellee was of the value of \$450. Upon these facts the court stated two conclusions: (1) "That, by reason of the breach of the covenants contained in said deed, * * * the plaintiffs are entitled to damages in the sum of \$450; (2) that by reason of the mutual mistake of the grantors and the grantees, and the mistake of the scrivener in the description inserted in said deed, the defendant is entitled to have the deed reformed to describe the following real estate [describing the land actually sold]." Upon these conclusions the court rendered judgment against appellant for \$450, and in his favor for the reformation of said deed. The appellant excepted to the first conclusion of law and assigns error by the court in said conclusion. The second conclusion might logically have been first stated. The deed as reformed is the deed by reference to which the suit for breach of covenant must be determined.

2. The facts found show appellees to be without any basis for the recovery of damages.

It is ingenuously argued that the complaint having been answered by a general denial only, the issue thus

3. made did not permit a reformation to defeat the claim for damages. Reformation was decreed upon an af-

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firmative pleading filed in the case, and such reformation rendered it impossible for appellees to establish their case as against a general denial.

The judgment is reversed and the cause is remanded, with instructions to restate the first conclusion of law in accordance herewith.

GILPIN v. PEOPLE'S BANK.

[No. 6,504. Filed December 15, 1909.]

1. **BILLS AND NOTES.—Negotiability.—Requisites.**—A note to be negotiable under the law merchant, must bear a date, and contain an unconditional promise to pay a certain sum of money at a certain time and place, and any uncertainty in any of such requisites destroys such negotiability. p. 53.
2. **BILLS AND NOTES.—Negotiability.—Designating Consideration.**—The designation of the consideration in a note does not destroy its negotiability. p. 55.
3. **BILLS AND NOTES.—Negotiability.—Collateral Security.—Mention of.**—A recital in a note that collateral is held as security and an authorization of the application of the proceeds to the payment of the note, does not destroy the negotiability of the note. p. 55.
4. **BILLS AND NOTES.—Negotiability.—Recitals.**—Recitals in a note of the consideration therefor, that the title to the goods for which the note was given does not pass until payment of the note, and that in default of payment the payee shall sell the goods and apply the proceeds to the payment of the note, do not destroy its negotiability. p. 56.
5. **BILLS AND NOTES.—Negotiability.—Uncertainty in Amount.**—A note containing a provision that all partial payments made thereon, until final payment, shall be taken and considered as rental for the property sold, destroys the negotiability of such note. p. 56.

From Jay Circuit Court; *John F. La Follette*, Judge.

Action by the People's Bank against Levi L. Gilpin. From a judgment for plaintiff, defendant appeals. *Reversed.*

J. W. Headington and *Roscoe D. Wheat*, for appellant.
Sumner W. Haynes, for appellee.

HADLEY, J.—This is an action by appellee against appellant, upon a written instrument consisting of the ordinary form of a promissory note, for \$100 with eight per cent interest and attorney's fees. The complaint recites that it is agreed between the parties that the title and ownership of the mare, describing her, for which this note is given, is not to pass from the payee to the purchaser until the purchase price is fully paid; that, upon failure to pay when due, the payee or its agents may take possession of said property, sell the same, and apply the net proceeds thereof to the unpaid purchase price of said property. The deficit, if any, after such application of such proceeds, to be paid by the maker. It closes with the following stipulation:

“It is expressly agreed that any partial payment made on this note, unless and until the full sum of said note, principal and interest be paid, shall be taken and considered as rental for the property therein described.”

The complaint alleged that before maturity of said note, for a valuable consideration, the same was assigned by indorsement of the payee to appellee. Appellant answered in five paragraphs: (1) General denial; (2) payment; (3) fraud; (4) want of consideration; (5) breach of warranty. A demurrer was sustained to the third, fourth and fifth paragraphs of answer. Appellant withdrew his first and second paragraphs of answer and refused to plead further, and judgment was rendered in favor of appellee. Error is assigned upon the rulings of the court in sustaining each of said demurrers.

The only question presented is whether the paper sued on is negotiable by the law merchant, it being conceded that if the note in question is such negotiable paper, the cause should be affirmed, otherwise it should be reversed.

Ordinarily, the essential requisites of a promissory note,

to be negotiable by the law merchant, are a date, an

1. unconditional promise to pay money in a certain sum, at a certain time and at a certain place. *Nicely v.*

Commercial Bank, etc. (1896), 15 Ind. App. 563, 57 Am. St. 245; *Walker v. Woollen* (1876), 54 Ind. 164, 23 Am. Rep. 639; *Nicely v. Winnebago Nat. Bank* (1897), 18 Ind. App. 30; *Proctor v. Baldwin* (1882), 82 Ind. 370.

It is contended by appellant that the stipulations contained in the note render it indefinite and uncertain as to the amount and manner of payment. It is established that any uncertainty, as to any of the requisites heretofore given, destroys the negotiability of a note. 2 Parsons, Notes and Bills, 146, 147; 1 Daniel, Negotiable Inst. (5th ed.), §§51a, 52; *Continental Nat. Bank v. McGeoch* (1889), 73 Wis. 332, 41 N. W. 409; *First Nat. Bank, etc., v. Alton* (1891), 60 Conn. 402, 22 Atl. 1010; *Chapman v. Wight* (1887), 79 Me. 595, 12 Atl. 546; *Wright v. Traver* (1889), 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50; *South Bend Iron Works v. Paddock* (1887), 37 Kan. 510, 15 Pac. 574; *McComas v. Haas* (1886), 107 Ind. 512; *Nicely v. Commercial Bank, etc., supra*.

The following cases illustrate what are considered such uncertainties as rendered the instrument nonnegotiable. In *Nicely v. Commercial Bank, etc., supra*, the note provided: "With exchange and costs of collection." The court held that "with exchange" was an uncertainty as to amount. To the same effect is *Nicely v. Winnebago Nat. Bank, supra*. In *McComas v. Haas, supra*, the court held that a note resting upon the performance of another contract, as a consideration, was uncertain as to payment. In *Continental Nat. Bank v. McGeoch, supra*, the note provided that the collateral might, in certain contingencies, be sold before the specified maturity of the note, in which event the whole debt should then become due, thus rendering the time of payment uncertain. In *First Nat. Bank, etc., v. Alton, supra*, the note provided for the return of the property and consequent discharge of the debt, thus rendering the manner as well as the time of payment uncertain. In *Chapman v. Wight*,

supra, the payment of the note depended upon the failure of a third party to pay a certain other note. In case said third party made such payment, the note in question was to be canceled, thus rendering such note uncertain as to the manner of payment. In the case of *Wright v. Traver*, *supra*, the note in question stipulated that in case it was not paid when due, the property for which it had been given should be returned to the payor, thus rendering the manner of payment uncertain. In *South Bend Iron Works v. Paddock*, *supra*, the note sued on provided that the property for which the note was given might be retaken at any time the payee might deem himself insecure, and in such case the payor should pay the difference between the amount of the note and the value of the property retaken. It will here be observed that the value of the property retaken and not the proceeds of sale thereof shall be credited on the note, thus rendering the time, manner and amount of payment uncertain.

Many more illustrations of like import might be given. It has, however, been held that the designation of the consideration for the promise to pay does not destroy its

2. negotiability. *Hereth v. Meyer* (1870), 33 Ind. 511; *Doherty v. Perry* (1871), 38 Ind. 15; *Nicely v. Commercial Bank, etc.*, *supra*; *New v. Walker* (1886), 108 Ind. 365, 58 Am. Rep. 40; *Clanin v. Esterly Harvesting Mach. Co.* (1889), 118 Ind. 372, 3 L. R. A. 863; *Wells v. Brigham* (1850), 6 Cush. 6, 52 Am. Dec. 750; 1 Daniel, Negotiable Inst. (5th ed.), §§51a, 52.

The recital that collateral is held as security and an authorization of the application of the proceeds of such collateral to the payment of the debt, does not affect the

3. negotiability of paper otherwise negotiable. *Towne v. Rice* (1877), 122 Mass. 67; *Fancourt v. Thorne* (1846), 9 Q. B. 312; *Arnold v. Rock River, etc., R. Co.* (1856), 5 Duer 207; *Valley Nat. Bank, etc., v. Crowell* (1892), 148 Pa. St. 284, 23 Atl. 1068, 33 Am. St. 824.

A great many decisions are to the effect that the negotiability of a promissory note, otherwise sufficient, is not destroyed by a recital of the consideration, and that the

4. title to the property for which such note is given shall remain in the payee until said note is paid, and if not paid at maturity, then the property to be seized, sold, and the proceeds applied to the extinguishment of the debt. *Newton Wagon Co. v. Diers* (1880), 10 Neb. 284, 4 N. W. 995; *Mott v. Havana Nat. Bank* (1880), 22 Hun 354; *First Nat. Bank v. Gary* (1882), 18 S. C. 282; *Howard v. Simpsons* (1883), 70 Ga. 322; *First Nat. Bank, etc., v. Slaughter* (1893), 98 Ala. 602, 14 South. 545, 39 Am. Rep. 88; *Burnley v. Tufts* (1888), 66 Miss. 48, 5 South. 627, 14 Am. St. 540; *Chicago R. Equipment Co. v. Merchants Bank* (1890), 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; *Heard v. Dubuque County Bank* (1878), 8 Neb. 10, 30 Am. Rep. 811; 2 Parsons, Notes & Bills, *supra*; 1 Daniel, Negotiable Inst., *supra*; *Collins v. Bradbury* (1874), 64 Me. 37; *W. W. Kimball Co. v. Mellon* (1891), 80 Wis. 133, 48 N. W. 1100; *Choate v. Stevens* (1898), 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277.

The last clause of the instrument before us, heretofore set out, renders the amount to be paid, or that may be collectible, uncertain. Under it the payor might

5. make partial payments to any amount less than the principal, and then upon default for the remainder, at maturity, be compelled to pay the whole of the principal, together with interest, so that under its terms any sum from \$100 to \$200, together with interest, might be payable. This is such an uncertainty as vitiates its negotiability, and it is entitled to no protection by reason of its being in the hands of an innocent holder.

Judgment reversed, with instructions to overrule the demurrers to the third, fourth and fifth paragraphs of answer and for further proceedings not inconsistent with this opinion.

ROOKER v. BRUCE.

[No. 6,820. Filed December 16, 1909.]

1. ACTION.—*Tort.—Contract.—Carriers.—Passengers.*—A carrier that falls to carry its passengers safely is liable to such passengers in tort or on contract, at their election. p. 58.
2. ATTORNEY AND CLIENT.—*Fees.—Negligence.—Counterclaim.*—In an action for attorneys' fees, a counterclaim for negligence in the conduct of the litigation may be pleaded by the client. p. 58.

From Superior Court of Marion County (67,478); *James M. Leathers*, Judge.

Action by William V. Rooker against Margaret Bruce. From a judgment for defendant, plaintiff appeals. *Affirmed.*

William V. Rooker, Elmer E. Stevenson, John W. Holtzman, and Lewis A. Coleman, for appellant.

John B. Elam, James W. Fesler and Woodburn Masson, for appellee.

RABB, J.—Appellant brings this action to recover attorney's fees claimed to be due to him under a contract averred to have been entered into between the parties.

Appellee filed a counterclaim, charging the appellant with negligence in the management and conduct of the litigation, for his services in conducting which he seeks a recovery.

Appellant's motion to strike out this counterclaim and his demurrer thereto were overruled, as were his objections to evidence offered to sustain the same, and these rulings present the only questions for our determination.

It is the theory of the appellant that negligence being a tort, damages arising therefrom cannot be made the subject-matter of a counterclaim or set-off to an action founded on contract.

It is true that negligence is a tort, but it may also constitute a breach of contract in certain cases. A common

carrier for instance, binds himself to exercise due

1. care in the carriage of passengers and goods entrusted to him, and his failure to do so is not only a tort, but also a breach of his contract, and for such breach he may be sued at the election of the injured party, either in tort or on the contract.

An attorney who undertakes to perform services for a client in the conduct of litigation, impliedly contracts to exercise due care, skill and knowledge of the law in

2. the conduct of his client's business, and his negligence in that regard is a breach of his contract, and a proper subject for counterclaim in any action he may bring to recover for his professional services.

Judgment affirmed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. MOORE, BY NEXT FRIEND.

[No. 6,913. Filed December 16, 1909.]

1. **RAILROADS.—Crossing Accidents.—Justices of the Peace.—Complaint.**—A complaint, in an action before a justice of the peace, alleging that defendant railroad company negligently ran its engine against plaintiff's horse and wagon, at a speed in violation of the city ordinance, after the defendant knew or should have known of the danger, and without any negligence on plaintiff's part, to plaintiff's damage, states a cause of action before a justice of the peace. p. 59.
2. **TRIAL.—Verdict.—General.—Effect.**—A general verdict settles all conflicts in the evidence in favor of the successful party, and establishes all allegations upon which there is any proof. p. 60.
3. **RAILROADS.—Crossing Accidents.—Last Clear Chance.—Evidence.**—Where it was impossible for the engineer to avoid the accident complained of, after he ascertained, or should have ascertained, the danger, the company is not liable. p. 60.
4. **NEGLECT.—Complaint.—Railroads.—Injuries to Property.—Negating Contributory Negligence.—Presumptions.**—In actions for damages to property, the plaintiff must aver and prove freedom from contributory negligence, and the presumption is against the one having the burden of proof. p. 60.

Cleveland, etc., R. Co. v. Moore—45 Ind. App. 58.

5. RAILROADS.—*Crossing Accidents.—Evidence.*—Where a driver, in the night, drove upon a crossing, without using any care, and his horse was killed by a passing train, no recovery can be permitted. p. 60.
6. EVIDENCE.—*Contradicting Physical Facts.—Presumptions.*—A person is conclusively presumed to hear what is clearly audible, and to see what is plainly visible. p. 61.
7. APPEAL.—*Want of Evidence.*—Where there is a total want of evidence to support a material allegation of the plaintiff's complaint, a judgment in his favor will be reversed. p. 61.

From Superior Court of Marion County (74,196);
 Vinson Carter, Judge.

Action by Ray Moore, by his next friend, against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

John J. Kelly, for appellant.

J. Burdette Little, for appellee.

ROBY, J.—This suit was begun before a justice of the peace. From a finding and judgment for the defendant, the plaintiff appealed, and obtained a judgment for \$160 in the Superior Court, and from this judgment the defendant appeals to this court.

The complaint, tested by the rules of pleading which obtain in actions before justices of the peace, is sufficient.

Clifford v. Meyer (1893), 6 Ind. App. 633. The

1. charge is that the defendant negligently ran its engine and train of cars against the plaintiff's horse and wagon. The specific acts of negligence set up are: That the train was run at a rate of speed in excess of that fixed by an ordinance of the city of Indianapolis, within the corporate limits of which the accident took place; that no warning of the approaching train was given by whistle, bell, or watchman, and that the persons in charge of the engine failed to reduce the speed, after they knew or should have known of the danger in which the driver of plaintiff's team

was placed. The general verdict settles all conflicts

2. of evidence in plaintiff's favor. It also establishes the charges of negligence made in the complaint, where there is any evidence supportive of them.

There is no evidence tending to sustain the averment of negligence on the part of the engineer, after the horse and wagon came into range of his vision, if it ever did so.

3. To have slackened speed as much as could have been done in the distance which the engine had to go after the frightened horse ran toward the track on which the train was approaching, might have enabled the horse to pass upon the track ahead of the train, in which event the driver could scarcely have hoped to escape with his life; as it was the horse ran against the engine and was killed. The wagon shafts were broken off and the vehicle stood otherwise unharmed.

This is an action to recover damages, for injury to personal property. It was therefore necessary for the plaintiff to aver and prove that he was not contributorily

4. negligent. *Indiana, etc., Torpedo Co. v. Lippincott Glass Co.* (1905), 165 Ind. 361. The presumption in such case is against the party having the burden of proof. *Hathaway v. Toledo, etc., R. Co.* (1874), 46 Ind. 25, 30; *Nichols v. Baltimore, etc., R. Co.* (1904), 33 Ind. App. 229.

The testimony of the driver is that he was driving in a walk until he "got right onto the first tracks." He then looked in each direction, and saw the train coming

5. from the west about three hundred feet distant. Its headlight was burning and it made "an awful roar" as it passed him. He testified that he could see nothing until he got on the first track, on account of obstructions which he described and with which he was familiar. It was dark. The horse saw the approaching engine as soon as the driver saw it, and became frightened. The approaching train was on a track, forty feet distant, and, as before stated, the frightened horse ran against the engine and was instantly

killed. There is no evidence that the slightest care was used to ascertain if a train was approaching, before driving upon the first track. The degree of care required from a traveler approaching a railroad crossing is well settled. He must take into account the presence of known obstructions which cut off the view, and ordinary care under the circumstances is the measure of his duty. *Chicago, etc., R. Co. v. Thomas* (1900), 155 Ind. 634; *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261; *Oleson v. Lake Shore, etc., R. Co.* (1896), 143 Ind. 405, 32 L. R. A. 149.

The appellee's driver did not use any care before passing upon the first track. It is true, he says he listened and heard nothing, but the physical fact and his own tes-

6. timony as to the noise made by the train are against him. He is presumed to have heard what he could have heard by listening. *Malott v. Hawkins* (1902), 159 Ind. 127; *Morford v. Chicago, etc., R. Co.* (1902), 158 Ind. 494.

The fright of the horse has no bearing upon this

7. part of the case. The facts did not make a case for the jury.

The judgment is reversed and the cause is remanded, with instructions to sustain appellant's motion for a new trial.

COLE CARRIAGE COMPANY v. HORNBECK ET AL.

[No. 6,523. Filed October 13, 1909. Rehearing denied December 16, 1909.]

1. *APPEAL.—Special Findings.—Conclusions of Law.—How Made Part of Record.*—Special findings and conclusions of law which were not signed by the judge, and which are not shown by an order-book entry to have been filed, constitute no part of the record. p. 62.
2. *APPEAL.—Special Findings.—Signing Nunc pro Tunc.*—An order of the trial judge, made upon a motion setting out the alleged special findings and praying for a signing thereof *nunc pro tunc* by the judge, that "the judge does now sign said special findings," without setting out such special findings, does not properly identify such special findings. p. 63.

Cole Carriage Co. v. Hornbeck—45 Ind. App. 61.

3. **APPEAL.—Special Findings.—Making Part of Record.—Trial.**—Special findings may be made a part of the record by the judge's signature thereto, by a bill of exceptions, or by an order of the court. p. 64.
4. **APPEAL.—Dismissal.—No Question Presented.**—Where no question is presented by an appeal, it will be dismissed. p. 64.

From White Circuit Court; *James P. Wason*, Judge.

Action by the Cole Carriage Company against James P. Hornbeck and others. From a judgment for defendants, plaintiff appeals. *Appeal dismissed.*

Pickens, Cox & Kahn, for appellant.

Palmer & Carr, and *Wesley Taylor*, for appellees.

HADLEY, C. J.—The only errors assigned in this cause are wholly dependent upon a special finding of facts and a conclusion of law. Appellees contend that no ques-

1. tion is thereby presented, since there is no duly authenticated finding of facts in the record. The original record filed in this cause shows that on November 26, 1906, the defendants (appellees) requested the court to find the facts specially and state the conclusions of law thereon. Afterwards, on March 14, 1907, the record, after showing the presence of the parties, states: "The court now proceeds to find the facts specially and states his conclusion of law thereon, which are in the words and figures following, to wit." Then follows a record which has the appearance of a special finding of facts and a conclusion of law, at the end of which it states: "The plaintiff now excepts to the above conclusion of law herein, and the same is indorsed on the conclusion of law so filed by the court." There is no signature of the judge attached to this purported finding of facts; neither is there any statement that the same was ever filed. The record last quoted might be held to convey the inference that the conclusion of law was filed; but, from its appearance in the record, it might easily have been separate and apart from the finding of facts. There is no entry of record showing that the finding was ever ordered to be filed

by the court, or that it was ever filed, and it is not brought into the record by a bill of exceptions.

After the transcript was filed in this court, appellant applied for a writ of *certiorari* from this court, which was granted, and the return of the clerk thereto shows

2. that appellant filed a motion in the lower court in said cause after the expiration of the term at which judgment was rendered, whereby it was sought to have the omission of the signature of the judge supplied, by having the judge sign the same *nunc pro tunc*. Over the objections of appellees, the court sustained the motion and made this entry thereon: "And the court, having heard the evidence and argument of counsel, and being duly advised in the premises, now sustains said motion of the plaintiff, and does now contemporaneously herewith sign said special finding of facts *nunc pro tunc*. And the clerk of this court is directed to make reference to this record on the record in said cause and the special finding of facts therein, and in making and certifying to any transcript on appeal in said cause to the Appellate Court or Supreme Court in this State, said clerk, if directed and ordered, to include in said transcript or amended transcript this record and the record of the proceedings on said motion, including all papers and pleadings filed at this term in said cause, all of which papers, pleadings and entries are made a part of the record in said entitled cause, to all of which the defendants severally and separately except."

It will be observed that while the record states that "the judge does now sign said special findings," the findings that he signed are not set out, or in any way designated or identified for this court. It is true that the motion for *nunc pro tunc* set out certain findings and a conclusion of law, but the court does not find that the findings thus set out were the findings made by the court on the trial; nor does the record show that the findings thus exhibited were the ones signed by the court. In other words, the record, as it appears be-

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fore us, does not exhibit special findings that have the verification and identification of the court in any manner. The determination of this cause being rested upon the findings, such findings should be presented to this court in such a way as to import absolute verity to authorize us to determine any question upon it.

There are three ways by which a finding may be identified and verified so as to be considered by this court: By the signature of the judge, by bringing it into the record

3. by a bill of exceptions, or by an order of court directing that it be filed and made a part of the record of the cause. *Coffinberry v. McClellan* (1905), 164 Ind. 131; *Winstandley v. Breyfogle* (1897), 148 Ind. 618; *Peoria, etc., Ins. Co. v. Walser* (1864), 22 Ind. 73; *Service v. Gambrel* (1887), 110 Ind. 349; *Branch v. Faust* (1888), 115 Ind. 464; *McCray v. Humes* (1888), 116 Ind. 103; *Ferris v. Udell* (1894), 139 Ind. 579.

There being no special findings in the record authenticated by any of said modes, no question is presented

4. for the consideration of this court. The appeal is therefore dismissed.

COULTER v. CRAWFORDSVILLE TRUST COMPANY, ADMINISTRATOR.

[No. 6,774. Filed June 25, 1900. Rehearing denied October 28, 1900. Transfer denied December 16, 1900.]

1. *WILLS.—Construction.—Rules for.*—Technical rules for the construction of wills will not overthrow the evident intent of the testator, unless such intent is in violation of the law. p. 68.
2. *WILLS.—Technical Words.*—Technical words in a will should be given their legal effect, unless other language used shows clearly that they were used with a different meaning. p. 68.
3. *WILLS.—Supplying Words.*—Words may be supplied in a will, where they do not oppose the manifest intent. p. 68.
4. *CONTRACTS.—Construction by Parties.—Estoppel.*—Parties to a written instrument who have placed a construction thereon and

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have parted with valuable rights upon the faith of such construction, are estopped to deny such construction. p. 68.

5. *WILLS.—Construction.—Complaint.—Theory.—Contracts.*—A complaint setting out a will and alleging that the parties thereto agreed upon a certain construction thereof, and demanding that the defendant shall perform the provisions of such will as construed, proceeds upon the theory of enforcing such agreement, and not of enforcing the will as it might be construed. p. 68.
6. *WILLS.—Ambiguities.—Construction by Parties.*—Where a testator gave to his wife "fifteen hundred dollars to stand in the farm," and such widow and the other devisees and legatees agreed that such amount should be considered as a bequest and be a lien upon the farm, a devisee who purchased other interests on a basis of such agreement, cannot evade the payment of such sum to the administrator of such widow upon her death. p. 68.

From Montgomery Circuit Court; *Jere West*, Judge.

Suit by The Crawfordsville Trust Company, as administrator of the estate of Elizabeth Coulter, deceased, against Samuel Coulter. From a decree for plaintiff, defendant appeals. *Affirmed.*

Clodfelter & Hesler, Perkins & McAlister, and Louis B. Erbbank, for appellant.

Glyde H. Jones and John B. Murphy, for appellee.

MYERS, J.—Appellee, as administrator of the estate of Elizabeth Coulter, deceased, brought suit against appellant to enforce payment of \$1,500 and interest thereon, and to have said sum declared a lien against certain real estate in Montgomery county, Indiana.

The complaint was in two paragraphs. A demurrer to each paragraph for want of facts was overruled. Appellant answered by a general denial and by affirmative paragraphs. Appellee replied in denial and by affirmative paragraphs. The issues thus formed were submitted to the court for trial, and as advisory to the court certain questions of fact were submitted to a jury, resulting in a finding and judgment for appellee, and against appellant in the sum of \$1,707.64, which amount was adjudged to be a lien upon certain real

estate described in the complaint. For a reversal of that judgment the overruling of appellant's demurrer to each paragraph of the complaint is assigned as error.

In the first paragraph of the complaint it is alleged that William Coulter died testate in May, 1886, and that Elizabeth Coulter, appellee's decedent, was his surviving wife; that at the time of the former's death, through their joint efforts, they had accumulated property of the value of \$8,000. A copy of the will of William Coulter is made a part of the complaint, and in so far as it is pertinent to the questions here to be considered it reads as follows:

"II. I give and bequeath unto my wife, Elizabeth Coulter, \$1,500 to stand in the farm with six per cent interest and all in the house and the northwest room downstairs and the north room upstairs or any of my family so long as they may remain single and my wife to have one cow and feed and pasture for the same and all needed fire wood.

III. I give and bequeath unto my son James B. Coulter \$1,000 to stand in the farm to draw six per cent interest and also one horse and one cow.

IV. I give and bequeath unto my daughter Margrite \$550.

V. I give and bequeath unto my daughter Priscilla Jane \$550.

VI. I give and bequeath unto my daughter Martha \$550.

VII. I give and bequeath unto my daughter Alice \$550.

VIII. I give and bequeath unto my son Samuel Coulter the one-half of my farm and the one-third of the horses, cows, hogs and sheep and farming tools by paying one-half of the heirs.

IX. I give and bequeath unto my son John N. Coulter the one-fourth of my farm and one cow and one-third of the horses, cows, hogs and sheep and farming tools by him paying one-fourth of the heirs.

X. I give and bequeath unto my son Harvey Coulter the one-fourth of my farm and one cow and the one-third of my horses, cows, hogs and sheep and farming tools by him paying one-fourth of my heirs.

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XI. My sons Samuel, John N. and Harvey to divide the farm to suit themselves.

XII. None of the above money bequests to be due until one year after my decease."

It was also alleged that said will was duly probated on May 14, 1886; that on July 30, 1886, the appellant by deed acquired the interests of John N. and Harvey Coulter in and to the land or farm as mentioned in said will; that after the death of said William Coulter, and prior to the execution of said deed whereby the appellant became the owner of the entire farm, each of the legatees and devisees under said will agreed upon a construction to be placed upon said item two of said will, and so construed the same as that by the provisions thereof said \$1,500 was to be considered and treated as an absolute bequest to said Elizabeth Coulter, and a lien upon said farm; that all of said legatees and devisees from that time on so treated said item as creating an indebtedness in favor of said Elizabeth Coulter for \$1,500, and a lien and charge against said farm; that said John N. and Harvey Coulter, as well as the appellant, acting upon said agreement and the construction so placed upon said item two, retained of the purchase money for said real estate so acquired from John N. and Harvey Coulter enough to pay the one-half of said \$1,500; that on October 13, 1904, Elizabeth Coulter died testate, leaving no other property than said \$1,500 and interest thereon, which is due and unpaid, and which appellant on demand has failed and refused to pay; that claims have been filed and allowed against the estate of Elizabeth Coulter, etc.; that appellant is the owner of all said real estate, etc.

The second paragraph is substantially the same as the first, except that it alleges that appellant agreed to hold said real estate and pay six per cent interest on said \$1,500 to Elizabeth Coulter so long as she desired the same to remain a lien upon said land, and at her death, if the same should not be fully paid, to pay to her estate any unpaid

balance, with six per cent interest; that appellant acted as the agent of Elizabeth Coulter, and held said \$1,500 in trust for her use and benefit, and controlled said sum as her property, and at no time disavowed said trust or agency; that upon demand appellant refused to pay said sum, etc.

It is unnecessary to cite cases in support of the proposition that technical rules for the construction of wills

1. must give way to the intention of the testator, where such intention can be enforced without contravening the well-established rules of law. *Stimson v. Rountree* (1907), 168 Ind. 169. It is also true that where technical words are used by the testator they will be given "their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." *Fowler v. Duhme* (1896), 143 Ind. 248, 259; *Stimson v. Rountree*, *supra*. It has been held that the
2. law will supply words in a will where they do not oppose the manifest intention of the testator. *Fowler v. Duhme*, *supra*. It is the law that "when the parties in interest have themselves placed a construction upon a written instrument, and acted upon such construction, and parted with valuable rights on the faith of such construction, courts will enforce the writing as construed by the parties interested and affected thereby." *Pate v. French* (1890), 122 Ind. 10.

It is the theory of appellant that in our investigation of this case we are limited to a consideration of the will alone.

In our judgment the complaint proceeds upon the

3. theory that item two, by agreement of all the parties in interest, was given a certain construction, and this suit is to enforce that agreement. Looking to the language of the entire will, it is evident that it was not drawn by one skilled in writing such instruments. Item two is not in clear and decisive language, and reasonable men
4. might differ as to what the testator thereby intended. The will was executed January 14, 1886, and at the

time of the death of William Coulter, May, 1886, he owned property of the value of \$8,000. The provision for the widow in item two of the will is shown to be less than that to which she was entitled by law. Within the time allowed the widow to reject the provision so made for her by said will (Acts 1885, p. 239, §3043 Burns 1908), the complaint shows that all the parties in interest, which included the widow, agreed that the \$1,500 mentioned in item two should be regarded and treated as an absolute bequest of \$1,500 to appellee's decedent, and that said sum should be a lien on the farm devised to Samuel, John N. and Harvey. She acted upon the agreed construction, and by will disposed of the same. It is shown also that John N. and Harvey Coulter applied the alleged agreement in the purchase and sale of interests in the farm. Items eight, nine and ten contain apt words for the disposition of the personal property therein mentioned, but not so as to the real estate, and yet no one would doubt what was thereby intended by the testator. The intention thus manifested, not being contrary to the rules of law, will be enforced by the courts. Item two, being somewhat uncertain and ambiguous, was a subject about which the parties in interest had a right by agreement to adjust and settle among themselves, as the complaint shows they did. No settled rule of law is shown to have been contravened by the alleged interpretation which the parties themselves placed upon item two.

Each paragraph of the complaint was sufficient to require an answer from the defendant.

Judgment affirmed.

CITY OF GREENFIELD v. ROBACK.

[No. 6,570. Filed December 17, 1909.]

1. NEGLIGENCE.—*Facts Constituting.—Complaint.*—A complaint which fails to allege that the acts complained of were negligently done, must allege facts showing a necessary inference of negligence. p. 72.
2. MUNICIPAL CORPORATIONS.—*Liability for Negligence.*—A municipal corporation is not an insurer of the safety of its streets; and to hold it liable negligence must be shown. pp. 72, 74.
3. MUNICIPAL CORPORATIONS.—*Negligence.—Complaint.*—A complaint alleging that defendant city for six months permitted to remain a sidewalk upon which there projected a piece of timber used as a horse for steps constructed by an adjacent lot owner, that the plaintiff without any knowledge thereof was traveling upon such sidewalk, at night, and struck such timber, throwing him heavily upon the walk, to his damage, fails to state a cause of action, since it fails to state that any act was negligently done, and such facts might exist without negligence. p. 74.

From Henry Circuit Court; *John M. Morris*, Judge.

Action by John F. Roback against the City of Greenfield. From a judgment on a verdict for plaintiff for \$3,250, defendant appeals. *Reversed.*

E. H. Bundy and *William C. Welborn*, for appellant.

Watson, Titsworth & Green, Forkner & Forkner, W. W. Cook, C. H. Cook, and *Smith, Cambern & Smith*, for appellee.

HADLEY, J.—This was an action by appellee against appellant for damages for personal injury alleged to have been received by appellee from a fall occasioned by a projection of wooden steps leading from the lawn of a private residence over and upon the sidewalk of said city.

The complaint, after formal averments and description of the streets, in substance, avers that the sidewalk, over which appellee was passing when injured, was a cement walk four feet wide; that he was walking along after night with his brother; that it was dark; that the sidewalk was

not lighted in any manner, and projections over the sidewalk could not be distinguished; that there were no guards or lights whatever upon or along said sidewalk; that while appellee was so walking, with due care and caution for his safety, and without any fault, carelessness or negligence on his part, and without any knowledge whatever of the condition of said walk, or any projection or obstruction thereon, and having no reason to anticipate or apprehend danger thereby, his right foot came in contact with a piece of timber being used as a horse for steps leading from said walk to a residence on the adjacent lot, at an incline of over forty-five degrees; that the bottom step and the horse thereof rested upon said cement walk and projected over and upon said cement walk at least five and one-half inches, and a sufficient distance to admit of appellee's striking the toe of his right shoe against said projecting horse while walking upon said cement walk as aforesaid, and against which he did strike his toe while so walking, which instantly tripped and threw appellee off his balance, and caused him to fall violently down upon said cement walk in front of said steps, striking his left hip with great force and violence over the region of the hip joint, whereby he sustained severe, lasting and permanent injuries, all without any fault, negligence or carelessness on appellee's part, and without any knowledge whatever of said defective condition of said cement walk or the projecting of said step or horse thereon whatsoever; that said obstruction to said sidewalk and the projection of said step and horse over and upon said cement walk, causing appellee to trip and fall as aforesaid, had existed at said place on said cement walk for a long time prior to appellee's said injury, to wit, more than six months immediately prior thereto, with the knowledge of the appellant and its officers, and for a sufficient length of time for the appellant and its officers to remedy the defect and to remove said obstruction from and off said cement walk, so

that said injury could not have happened to appellee while so using said cement walk as aforesaid.

A demurrer was filed to this complaint, which demurrer was overruled. This ruling is assigned as error, and will be first considered by us. It will be observed that the

1. complaint contains no specific averment of negligence on the part of appellant. This, however, is not fatal to the complaint if the specific facts averred are sufficient to a certainty to raise a presumption of such negligence and to enable us to say, as a matter of law, that appellant was negligent, and that such negligence was the proximate cause of the injury complained of. *Pennsylvania Co. v. Marion* (1885), 104 Ind. 239; *Louisville, etc., R. Co. v. Hicks* (1894), 11 Ind. App. 588; *Town of Royal Center v. Bingaman* (1906), 37 Ind. App. 626.

A municipal corporation is not an insurer of the safety of its streets, and, to fasten a liability upon it for injuries resulting from defects in its streets, it must be affirm-

2. atively shown that the municipality was guilty of negligence. The question is always one of negligence, for, in no instance, can there be a recovery unless the corporation has failed to exercise ordinary care, skill or diligence to make its streets reasonably safe for passage. *City of Franklin v. Harter* (1891), 127 Ind. 446; *City of Fort Wayne v. DeWitt* (1874), 47 Ind. 391; *Higert v. City of Greencastle* (1873), 43 Ind. 574; *Town of Royal Center v. Bingaman, supra*; *City of Vincennes v. Spees* (1905), 35 Ind. App. 389.

In the case of *City of Franklin v. Harter, supra*, the negligence on the part of the city, as claimed, consisted in leaving a cellarway in the sidewalk railed on two sides

1. but open on the entrance from the sidewalk. This condition was maintained for several years. The court instructed the jury that this state of facts charged the city of Franklin with liability to the plaintiff. In discussing this instruction the court used this language: "As

the question in cases where a municipal corporation is sought to be held liable for injuries caused by a defect in a street is one of negligence, it is seldom that the court can determine the question as one of law, for in by far the greater number of cases the question is a complex one, in which matters of law blend with matters of fact. In all such cases the duty of the court is to instruct the jury as to the law, and that of the jury is to determine whether, under the law as declared by the court, there is actually negligence. Nor does this general rule fail in all cases where the facts are undisputed, since the rule has long been settled in this State, that where an inference of negligence may or may not be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions, but where only one inference can be reasonably drawn from the facts, the question of negligence or no negligence may be determined by the court as one of pure law." See, also *Teague v. City of Bloomington* (1907), 40 Ind. App. 68; *City of Huntington v. Stuber* (1908), 41 Ind. App. 171.

In the case of *Town of Royal Center v. Bingaman*, *supra*, the complaint charged that for more than thirty days, in a certain street, piles of brick, sand, gravel, dirt, lumber, lime, boxes, barrels and rubbish, to the height of six feet and extending more than half way across the street, were permitted to remain therein; that the same was calculated to frighten horses, and did frighten appellee's horse, which caused it to run away, whereby she was injured; that appellant town had ample notice of said condition in ample time to remove the same, and that no lights, or other safeguards, or other warnings were maintained around said obstruction. The complaint contained no direct averment of negligence. The court, in discussing a demurrer to this complaint said: "It was necessary to the sufficiency of the complaint tested by demurrer that, by direct averments of facts, it should show a wrong of the appellant constituting the proximate cause of the injury alleged. No act or omis-

sion of the appellant was alleged; the presence of an obstruction, described, in the street was stated and notice to the appellant of its presence was averred; but it was nowhere charged that anything was negligently done, or omitted, or permitted, or suffered by the corporation. It is not necessary to show negligence by the use of that word in pleading, if what is alleged may be said as a matter of law to constitute negligence; but in such a case as this it is necessary that the complaint show by its allegations a wrong as a proximate cause." The complaint was held insufficient.

A city is not required to make its streets and sidewalks absolutely safe, since it is not an insurer of the safety of those who pass along them. All that is required is

2. that they be made reasonably safe. *City of Vincennes v. Spees, supra.*

The obstruction complained of in this case was there by the act of a third party. It extended on the sidewalk five and one-half inches and slanted back from the side-

3. walk at an angle of forty-five degrees. It had remained in this condition six months, with the knowledge of appellant's officers. The walk was four feet wide. Whether the street, in the condition described, was reasonably safe for travel, and whether the city was negligent in permitting it to remain in this condition, with no possibility of excuse, are questions about which reasonable men might differ. *Perrigo v. City of St. Louis* (1904), 185 Mo. 274. What is reasonably safe and what constitutes negligence are both questions determinable only from the particular circumstances of each case, and it is usually difficult to say, in a contested case, that certain facts constitute negligence. The question becomes most difficult when we have to determine the liability of a municipal corporation for something suffered to be done or maintained by a third person; for, in the very nature of things, municipal officers cannot give that close inspection and observation of its many streets and alleys that might be required of an individual in charge of

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a single factory or other business establishment. Each is required to exercise reasonable care, but what would be reasonable care in the former might be negligence in the latter. *Pumoro v. City of Merrill* (1905), 125 Wis. 102.

For these reasons we cannot say that the facts averred in the complaint show negligence to that certainty required in cases where negligence is not directly averred. The demurrer to the complaint should have been sustained. Other questions presented will not necessarily arise on a retrial.

Judgment reversed, with instructions to sustain the demurrer to the complaint, with privilege of amending.

WORKMAN v. BENT.

[No. 6,422. Filed December 17, 1909.]

APPEAL—From Boards of Commissioners.—“Aggrieved” Persons.—Taxpayers.—A resident, citizen and taxpayer of a county is entitled to appeal as an “aggrieved” person, under §6021 Burns 1908, §5772 R. S. 1881, giving such person a right of appeal from an allowance by the board of commissioners.

From Wabash Circuit Court; *A. N. McCracken*, Special Judge.

Appeal by Walter S. Bent from an allowance to Joseph B. Workman by the Board of Commissioners of the County of Wabash. From a judgment against claimant, he appeals. *Affirmed.*

G. A. Henry and *Walter G. Todd*, for appellant.

D. F. Brooks and *Walter S. Bent*, in *pro. per.*, for appellee.

PER CURIAM.—This is an appeal taken from an order of allowance by the Board of Commissioners of the County of Wabash, whereby said board allowed the sum of \$2,189.38 to appellant for discovering and placing upon the tax duplicate taxes on sequestered property, under a contract with said board for such services. Appellee filed an affidavit of

appeal, under §6021 Burns 1908, §5772 R. S. 1881. Appellant moved to dismiss the appeal, on the ground of the insufficiency of the affidavit, which motion was overruled, and this ruling is presented as reversible error.

The affidavit shows that appellee is a resident, citizen and taxpayer of said county; that the board of commissioners had allowed the claim, describing it; that said claim was filed under a contract with said appellant to search for sequestered property and cause the same to be placed on the tax duplicate for taxation; that said contract was illegal and unauthorized in law, and that the commissioners, in making the allowance, acted without authority in the premises.

The defect urged against this affidavit is that it does not show that appellee is "aggrieved." The contention cannot be sustained. One who is compelled to pay taxes to pay an illegal claim against the county, certainly has a grievance, and the motion to dismiss was properly overruled.

The controlling question in this case, being the right of the board of commissioners to enter into the contract for the ferreting out of sequestered property for the purpose of taxation, is identical with the question decided in *State, ex rel., v. Goldthait* (1909), 172 Ind. 210, and upon the authority of that case this case is affirmed.

CITY OF TIPTON v. FREEMAN.

[No. 6,493. Filed December 17, 1909.]

1. APPEAL.—*Separate Assignments.*—*Joint Exceptions.*—Separate assignments of errors on the overruling of a separate demurrer to the two paragraphs of complaint, are proper, though the exception taken was joint. p. 78.
2. MUNICIPAL CORPORATIONS.—*Defective Sidewalks.*—*Notice.*—*Complaint.*—An allegation that defendant city had maintained a defective sidewalk for two years preceding the plaintiff's injury,

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shows that the city had at least constructive notice of the defect. p. 78.

3. MUNICIPAL CORPORATIONS.—*Sidewalks.—Duty.*—Cities are required to keep their sidewalks in such a condition that persons using them with prudence and ordinary care, may do so without peril. p. 79.
4. MUNICIPAL CORPORATIONS.—*Defective Sidewalks.—Complaint.*—A complaint alleging that defendant city negligently permitted and suffered its sidewalk to remain for two years in a slanting, polished condition, by reason of which plaintiff fell, to her damage, states a cause of action. p. 79.
5. APPEAL.—*Weighting Evidence.*—The Appellate Court will not weigh conflicting evidence, and if there is some evidence tending to sustain every material allegation of the complaint, the plaintiff's judgment will not be disturbed. p. 79.

From Tipton Circuit Court, *J. F. Elliott*, Judge.

Action by Nancy Freeman against the City of Tipton.

From a judgment for plaintiff, defendant appeals. *Affirmed.*

James M. Purvis and *R. B. Beauchamp*, for appellant.

Gifford & Gifford, for appellee.

WATSON, J.—This was an action for personal injuries received by the appellee upon a sidewalk within the corporate limits of the city of Tipton, on November 2, 1904. It is alleged that the appellee was a citizen of Sharpsville, Tipton county, and unacquainted with the sidewalks of the city of Tipton; that she received her injuries on the sidewalk situated on the north side of Jefferson street, between Independence and North Main streets, in front of the building owned by Mary A. Gleason; that said sidewalk at said point was constructed out of limestone more than two years prior to said accident, and was so constructed with a slant or decline from the north to the south side thereof of about one inch to the foot, and by usage had become smooth and assumed a very highly polished surface: that, by reason of the construction of said sidewalk and the worn and polished condition of the stones thereof, appellee, in passing over said portion of said sidewalk, slipped and fell thereon,

and as a result of said fall received severe injuries, bruising her right side and arm, and breaking the femur in her right lower limb; that she was without fault, and her injuries were due to the fault and negligence of said defendant in permitting and suffering said sidewalk to be and remain in said dangerous condition for more than two years.

The complaint was in three paragraphs, to each of which a separate demurrer was addressed and overruled. The cause was put at issue and trial had by the court without the intervention of a jury. The court found for the plaintiff and awarded her damages in the sum of \$1,200. Motion for a new trial was overruled and exceptions saved, and an appeal prayed for and granted.

The errors assigned are the overruling of the demurrers to each paragraph of the complaint, and the overruling of the motion for a new trial. The assignment of errors

1. is separate as to the rulings on said demurrer, and the exception is a joint exception. The appellee earnestly insists that this presents no question, and in support of her contention cites *Noonan v. Bell* (1902), 159 Ind. 329; *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460.

The Supreme Court, in the case of *Whitesell v. Strickler* (1907), 167 Ind. 602, 119 Am. St. 524, considered the rulings in the two cases before referred to, and disapproved and overruled such decisions.

The appellant insists that it did not know of the dangerous condition of the sidewalk, which was averred to have been in the then condition for two years or more prior

2. to said accident. If it did not have actual knowledge of this condition, it could have known of it by the exercise of ordinary care within the time averred, which it was required to do, to the end that it might keep its streets and sidewalks in reasonably safe condition for use. *Lyon v. City of Logansport* (1894), 9 Ind. App. 21; *City of Columbia City v. Langohr* (1898), 20 Ind. App. 395; *City of Indi-*

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anapolis v. Mitchell (1901), 27 Ind. App. 589; *City of Logansport v. Dick* (1880), 70 Ind. 65; *City of Aurora v. Bitner* (1885), 100 Ind. 396; *City of Michigan City v. Balance* (1890), 123 Ind. 334; *City of Columbus v. Strassner* (1890), 124 Ind. 482; *City of Anderson v. Fleming* (1903), 160 Ind. 597, 66 L. R. A. 119.

The appellee was lawfully using the sidewalk at the time she received her injuries. It was the duty of the city to

keep the sidewalk in such a condition that persons
 3. using it properly, who did so with prudence and ordinary care so as not to bring injury upon themselves, could do so without peril. It is averred in the complaint that the defendant negligently and carelessly permit-

4. ted and suffered said sidewalk to be and remain in said slanting, smooth, polished and dangerous condition for a long time prior to said accident; that plaintiff was unacquainted with said sidewalk or the conditions thereof, and that she received her injuries without any fault or negligence on her part.

Each paragraph avers facts sufficient to constitute a cause of action against the appellant. The trial court did not commit error in overruling the demurrers to these several paragraphs. *City of Huntington v. Burke* (1899), 21 Ind. App. 655; *City of Huntington v. McClurg* (1899), 22 Ind. App. 261; *Town of Sellersburg v. Ford* (1906), 39 Ind. App. 94; *Brush Electric, etc., Co. v. Kelley* (1890), 126 Ind. 220, 10 L. R. A. 250; *Mayor, etc., v. Starr* (1895), 112 Ala. 98, 20 South. 424.

The question assigned and argued, presented by the motion for a new trial, is "that the decision of the court is not sustained by sufficient evidence." The rule is well set-

5. tled by the Supreme Court and this court, that it is the duty of the trial court to pass upon the question of the sufficiency of the evidence, and if there is some evidence to support the finding, it is the duty of this court to sustain the trial court, unless it should clearly appear that

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substantial justice has not been done. *Cristy v. Holmes* (1877), 57 Ind. 314; *Isler v. Bland* (1889), 117 Ind. 457; *Lake Erie, etc., R. Co. v. Stick* (1896), 143 Ind. 449; *Rarick v. Ulmer* (1896), 144 Ind. 25; *Parkison v. Thompson* (1905), 164 Ind. 609; *First Nat. Bank v. Beach* (1904), 34 Ind. App. 80; *Hoosier Construction Co. v. National Bank, etc.* (1905), 35 Ind. App. 270.

In this case the evidence supports the conclusion reached by the trial court. We are, therefore, not warranted in disturbing the finding.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY v. BUFKINS.

[No. 6,770. Filed October 5, 1909. Rehearing denied December 17, 1909.]

1. TRIAL.—*Verdict.*—*Effect.*—A general verdict for the plaintiff establishes the allegations of his complaint. p. 81.
2. MASTER AND SERVANT.—*Railroads.*—*Defective Track.*—*Interrogatories.*—In an action by a bridge carpenter who was riding on a hand-car and who was injured by reason of a low joint and rotten cross ties, answers to the interrogatories to the jury that he had been employed seven days, and that he had passed over the defect "several times," do not overturn a verdict for plaintiff, since neither actual nor constructive notice of the defect is shown. p. 81.
3. MASTER AND SERVANT.—*Railroads.*—*Defective Track.*—*Interrogatories.*—In an action by a bridge carpenter who was riding on a hand-car "on the Jasper branch," and who was injured by reason of a low joint and rotten cross-ties, answers to interrogatories to the jury showing that the roadbed between Jasper and Huntingburg was in process of reconstruction and that the bridges were being elevated to conform to grade and that the plaintiff was engaged on such bridges, do not overthrow a general verdict for the plaintiff, there being no finding that the plaintiff was assisting in work on the track. pp. 81, 83.
4. MASTER AND SERVANT.—*Assumption of Risk.*—*Railroads.*—*Repairing Tracks.*—A servant employed to remedy defects in a railroad track, or in constructing a new track, assumes the risks of such defects, or the dangers of derailing cars on such new track, while engaged in such repair or construction. p. 82.

From Dubois Circuit Court; *F. A. Ely*, Judge.

Action by Anthony A. Bufkins against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

M. W. Fields, A. P. Humphrey, E. P. Humphrey, J. D. Welman and *R. M. Milburn*, for appellant.

Cox & Armstrong, for appellee.

ROBY, P. J.—It is alleged in the complaint that the appellant negligently permitted its railway track to have in it a low joint, and a defective, old and rotten cross-tie, because of which appellee, who was aboard a hand-car passing over said track, was thrown and injured. He is averred to have been in appellant's employ as a bridge carpenter. The answer was a general denial. There was a trial by jury, verdict and judgment for \$1,200.

The only error alleged is based upon the action of the court in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. In support of this assignment it is argued that the appellant is shown not to have been guilty of negligence; that the appellee assumed the risk of the defective track, and that he was injured by reason of a condition which he was engaged in repairing.

The general verdict finds the negligence charged in the complaint. The answers to interrogatories do not

1. negative the fact so found. It is found that appellee had been in appellant's employ seven days, and that he had passed over the place where he was injured
2. upon a hand-car "several times." There is no finding that the appellee knew of the defect because of which the hand-car was derailed. Facts are not found showing that he should have known thereof. It is found that the railroad between Jasper and Huntingburg was in process of reconstruction, and that bridges were being elevated to conform to the new grade line, in which
- 3.

latter work appellee had been employed. These facts are not inconsistent with the safety of the track. They do not convey knowledge of the particular defect, and if they did would not be inconsistent with the nonappreciation of the danger. *Avery v. Nordyke & Marmon Co.* (1905), 164 Ind. 186. Neither can low joints and rotten cross-ties be regarded as necessary incidents to the employment.

The well settled rule that, where a servant is employed to put a thing in a suitable and safe condition for use, the master is not required to have the thing in safe condition and good repair for the purpose of such employment, does not apply, for the reason that there is no finding that appellee was employed to put the appellant's railroad track in a safe condition.

Judgment affirmed.

ON PETITION FOR REHEARING.

ROBY, J.—Appellant urges its petition for rehearing upon the ground that the answers to interrogatories do show that appellee was injured by reason of defects in the track in which he was engaged in repairing. The findings are that appellant's track between Jasper and Huntingburg was being "practically rebuilt," including the elevation of bridges to conform to new grade lines, and that appellee was assisting to raise such bridges to such lines.

The averment of the complaint is that the appellant had negligently suffered and permitted a part of its track, known as the Jasper Branch, to get out of repair, and to have therein a great number of low joints, defective, old and rotten cross-ties, so much so that when trains and cars would pass over said defective track the same was not sufficient to conduct said trains and cars.

The servant is not permitted to recover on account of defects which he is employed to remedy, such defects

4. becoming, by the terms of the employment, an ordinary risk incident to the service.

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Where a railroad is in process of construction, and a train is derailed by reason of the fact that the construction has not proceeded far enough to make the track safe, the doctrine applies to one engaged in such construction. *Baltimore, etc., R. Co. v. Walsh* (1897), 17 Ind. App. 505; *Gimbel v. Green* (1893), 134 Ind. 628.

Even if it be inferred that appellant's track between Jasper and Huntingburg is the one designated in the complaint as the Jasper Branch, and inferences are not allowed

3. in aid of answers to interrogatories, the answers are not yet in impossible conflict with the general verdict, for the reason that they do not show that the defect which caused the injury was in any way due to the rebuilding of said track. Neither do they show that the work which was being done had for its purpose the repair of the defects complained of.

The petition for rehearing is overruled.

HARMON, RECEIVER, v. PERKINS.

[No. 6,867. Filed June 24, 1909. Rehearing denied December 17, 1909.]

1. RECEIVERS.—*Actions against.*—*Permission.*—Ordinarily, a receiver cannot be sued without the consent of the court making his appointment. p. 85.
2. RECEIVERS.—*Actions against.*—*Federal Courts.*—Receivers appointed by the federal courts may be sued without leave of the appointing courts, where the cause of action originated out of the receivers' transactions. p. 85.
3. RAILROADS.—*Receivers.*—*Negligence.*—*Complaint.*—A complaint against a railroad company and its receiver, alleging that such company and its servants negligently ran its train against a box-car on which plaintiff was working, to his damage, states no cause of action against such receiver. p. 86.
4. RECEIVERS.—*Railroads.*—*Principal and Agent.*—Receivers and the companies for which they are appointed, are separate persons, and the agents of such companies do not represent such receivers. p. 86.

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5. **RECEIVERS.—Prior Acts of Company.—Liability.**—A receiver of a railroad company is not liable for the prior negligent acts of such company. p. 87.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by Augustus L. Perkins against Judson Harmon, as receiver of the Cincinnati, Hamilton and Dayton Railway Company, and another. From a judgment for plaintiff, defendant receiver appeals. *Reversed.*

John B. Elam, James W. Fesler, Harvey J. Elam and Smith, Cambern & Smith, for appellant.

Alfred E. Martin, Watson, Titsworth & Green and Louis B. Ewbank, for appellee.

COMSTOCK, J.—Appellee brought this suit against the Cincinnati, Hamilton and Dayton Railway Company and appellant as receiver of said company, to recover damages for personal injuries received by him. The complaint is in one paragraph, and alleges, in substance, that on and prior to August 22, 1906, and ever since that time, said defendant railway company was and is a corporation duly organized and incorporated under the laws of Indiana, and at said times owned and was operating and controlling a line of railroad from the city of Indianapolis, Indiana, through the counties of Rush and Fayette to the city of Cincinnati, Ohio; that on said day the plaintiff was employed and at work at the elevator of Brown & Riley in the city of Rushville, Indiana, located on the south side of a switch leading from said tracks of the defendant to and past said elevator; that a box-car was standing upon said switch track, for the purpose of being loaded with grain from said elevator; that plaintiff was assisting in preparing said car for loading, and in order to inspect this car, to determine whether it was ready to be loaded, placed a ladder upon the grain door in the car and ascended to the top of it; that while the plaintiff was on the ladder, the defendant, by and through its employees and trainmen, without warning or notice of any kind, carelessly

and negligently, and with great force and speed, ran an engine and train of cars upon and over said switch from the east and against said car, thereby throwing the plaintiff to the ground, to his injury, etc. Here follow allegations of the appointment of a receiver.

To this complaint the separate demurrer of said railway company was sustained. The separate demurrer of the appellant was overruled, and issue formed by a general denial. A trial by jury resulted in a verdict in favor of appellee for \$2,000, and over appellant's motion for a new trial judgment was rendered thereon.

The only errors assigned are the overruling of appellant's demurrer for want of facts to the complaint and his motion for a new trial.

It is first insisted that the complaint is insufficient, in that there is no allegation "of any leave granted to sue the receiver, and no case is stated within the federal statute of 1888." It seems to be the general rule that a

receiver can neither sue nor be sued, without first obtaining leave of the court making the appointment. *Wayne Pike Co. v. State, ex rel.* (1893), 134 Ind. 672, 673, and cases cited.

Where, however, the receiver is appointed by a court of the United States, said rule has been materially modified by an act of congress. Act of congress, March 3, 1887

2. (24 Stat. 552), as amended in 1888 (25 Stat. 436).

Malott v. Shimer (1899), 153 Ind. 35, and cases cited; *Malott v. Hawkins* (1902), 159 Ind. 127, and cases cited; *Peirce v. Jones* (1900), 24 Ind. App. 286.

Said statute provides that any receiver "appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." This section of the statute has been construed a number of times, and with one exception, so far as we are informed,

has been held to be limited to the acts or transactions of the receiver after his appointment and assumption of the control of the property. As hereafter stated, the facts do not bring the case at bar within the terms of the statute.

It is argued that there is no allegation of any wrongful act of the receiver, and, hence no allegation of any negligent act chargeable to him. The allegations upon this

3. point are that the defendant railway company, on and prior to August 22, 1906, and ever since that time, "owned and was operating and controlling a railway line" running from the city of Indianapolis, through Rush county to Cincinnati, Ohio; that said defendant owned and used a large number of locomotives on said track; that while the plaintiff was on the ladder, "the defendant, by and through its employes and trainmen, without warning or notice of any kind, carelessly and negligently, with great force and speed, ran an engine," etc. These allegations charge the act complained of to the defendant railway company through its employes. No act is charged against the receiver, and, therefore, no liability is shown. *Northern Pac. R. Co. v. Heflin* (1897), 83 Fed. 93, 27 C. C. A. 460; *Finance Co., etc., v. Charleston, etc., R. Co.* (1891), 46 Fed. 508; *Decker v. Gardner* (1891), 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Robinson v. Mills* (1901), 25 Mont. 391, 65 Pac. 114; *Central Trust Co., etc., v. East Tenn., etc., R. Co.* (1894), 59 Fed. 523; *McDermott v. Crook* (1902), 20 App. D. C. 465; *Robinson v. Kirkwood* (1900), 91 Ill. App. 54.

The complaint was originally against the railway company and the receiver. The demurrer of the railway company was sustained. No change was made after said ruling, so far as the record shows, in the complaint. The railway company

and the receiver are distinct bodies. The agents of
4. the railway company are not the agents of the receiver. The complaint charges the negligent acts to have been committed by the agents of the railway company.

Following the acts charged against the defendant railway company, the complaint further alleges the appointment and qualification of said receiver. The averments are, in part, that on December 4, 1905, appellant "was by said court duly appointed receiver of said property, and immediately qualified as such receiver, and ever since then has been and now is acting in said capacity, and by the terms of the order * * * he was authorized to take possession of all the tracks, etc., of said corporation, and was further ordered immediately to take charge of, manage and operate said property; * * * that, pursuant to said order, said Harmon is, as such receiver, in full possession of all the property of said defendant and is operating said road and receiving the income therefrom."

It thus appears that the railway company on and prior to August 22, 1906, and ever since that time has owned and operated the road. It shows that the receiver was

5. appointed and qualified on December 4, 1905, and was authorized to take charge of the road, but it does not appear that he was in possession of and operating the branch upon which accident occurred at the time of the injury.

The receiver is answerable only for the acts of negligence of his own servants and employes operating the franchise of the corporation. Such liability must be made to appear from the averments of the complaint. It has been held that a receiver may be made liable for the negligent acts of the corporation prior to his appointment, and assumption of control of the property. In the case of *Meyer v. Harris* (1897), 61 N. J. L. 83, 38 Atl. 690, the decision appears to be based upon the case of *McNulta v. Lockridge* (1891), 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796. That decision does not warrant such holding. In that case the question was whether a person holding the office of receiver could be held responsible for the acts of his predecessor in the same office,

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and it was held that an action would lie by and against a receiver for causes of action accruing under his predecessor in office. The opinion proceeds upon the principle that an action at law cannot be sustained against a receiver upon a cause of action which accrued against the corporation before the commencement of the receivership. However, when it is sought to hold either a receiver or a corporation being administered by a receiver liable for a negligent act, it must appear by appropriate averment that the act complained of was committed by the party against whom the liability is sought to be enforced.

The complaint before us charges the railway company with the negligent act, and does not charge the receiver. This is done by plain averments not open to technical grammatical construction. The court erred in overruling the demurrer.

The complaint being insufficient, it is unnecessary to consider the motion for a new trial.

Judgment reversed, with instructions to sustain appellant's demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

MELLETTE v. INDIANAPOLIS NORTHERN TRACTION COMPANY ET AL.

[No. 6,187. Filed December 8, 1908. Rehearing denied June 8, 1909. Transfer denied December 14, 1909. Appeal to Supreme Court dismissed January 4, 1910.]

1. **TRIAL.—General Verdict.—Effect.—Interrogatories.**—A general verdict is a finding for the successful party upon all the issues, but an answer to an interrogatory to the jury controls such verdict so far as such answer affects the verdict. p. 93.
2. **MASTER AND SERVANT.—Unsafe Place.—Obvious Defects.—Use of Faculties.**—A servant is required to use his faculties to discern and avoid obvious defects and dangers. p. 94.
3. **MASTER AND SERVANT.—Defects.—Reliance upon Performance of Duty.**—A servant is conclusively presumed to know of obvious, but not latent defects; and the master is required to ascertain

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- and remove latent defects, the servant having a right to rely upon the master's superior knowledge as to such defects. p. 94.
4. MASTER AND SERVANT.—*Obvious Dangers.*—*Ice and Sleet.*—*Railroads.*—*Trestles.*—A servant is conclusively presumed to know that a wet railroad trestle will be covered with ice and will be slippery when the temperature is at zero. p. 94.
 5. MASTER AND SERVANT.—*Latent Defects.*—*Rain.*—*Ice.*—*Snow.*—A servant who knows of a rain immediately followed by zero weather and a snow, is conclusively presumed to know that there will be ice under the snow, causing exposed objects to be slippery. p. 95.
 6. MASTER AND SERVANT.—*Assumption of Risk.*—*Known Defects.*—A railroad construction foreman who goes upon a trestle knowing it to be covered with ice assumes the risk of slipping therefrom, although he slips in less than a minute after going upon such trestle. p. 95.
 7. MASTER AND SERVANT.—*Negligence.*—*Specific Orders.*—A master who gives to his servant a specific order, leaving to the servant no discretion, is liable for resultant injuries, unless the danger is so glaring that an ordinarily prudent person would not incur it. p. 96.
 8. MASTER AND SERVANT.—*Specific Orders.*—*Complaint.*—A complaint alleging that "defendants ordered and directed that plaintiff and his crew proceed in the work of constructing such bridge and trestle," does not show an order so specific as to make the defendants liable to a servant who fell from the trestle which was covered with ice. p. 97.
 9. MASTER AND SERVANT.—*Specific Orders.*—*Interrogatories.*—Answers to one interrogatory, showing that defendants ordered the plaintiff to proceed to the top of an ice-covered trestle and put the stringers in position; to another, that defendant's order was as follows: "There are no new orders, the old orders still stand. Go ahead and push the work on the trestle on the island," and to others, that defendants, upon a request from plaintiff as to his work, ordered: "No, you keep on at that work. I want you to get it done as quickly as possible. I want you to hurry it up. Keep working at the trestle on the island. Push the work," do not show such a specific order as renders the master liable, where the servant, in obedience, went upon an ice-covered trestle and was injured thereby. pp. 97, 98.
 10. MASTER AND SERVANT.—*Interrogatories.*—*Evidentiary Facts.*—An answer to an interrogatory, in an action by a servant against his masters, setting out verbatim the order given to the servant, states a fact, and not an evidentiary fact. p. 98.
 11. MASTER AND SERVANT.—*Obvious Dangers.*—*Warning.*—A master is not required to warn his servant against obvious dangers. p. 98.

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From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Peter Mellette against the Indianapolis Northern Traction Company and others. From a judgment for defendants, notwithstanding a general verdict for the plaintiff for \$8,000, plaintiff appeals. *Affirmed.*

M. Winfield and George A. Gamble, for appellant.

J. A. Van Osdol, Myers & Yarlott, McConnell, Jenkins, Jenkins & Stuart, for appellees.

HADLEY, J.—Appellant sued appellees for injuries received while engaged in work as their employe. Trial was had and a general verdict returned for appellant, together with answers to interrogatories. Upon motion, judgment was rendered for appellees upon the answers to interrogatories, notwithstanding the general verdict. The only question we shall consider is this ruling of the court below.

The complaint is in two paragraphs, each of which states that appellant was employed as a bridge foreman in the construction of bridges for appellees; that, at the time of the injuries complained of, appellant, with a crew of men, was constructing a bridge, the trestle work of which was about thirty feet high; that on January 14, 1904, while said bridge and trestle were in process of construction, the weather became very cold, and much rain had fallen the day before, on account of which the ground in the vicinity of the trestle became frozen, and the timber and tools used in the construction thereof became covered with ice, causing the premises and all of the timbers, tools and appliances used in the construction of said bridge to be and remain in a slippery condition, rendering it difficult to be upon and about said bridge and trestle, and to handle the timbers and put them in position, causing such tools and appliances to be difficult to handle, altogether causing it to be hazardous to work upon said bridge and trestle and to place the heavy timbers and other materials in proper position, which unsafe and hazardous condition was unknown to appellant and could not be

seen by him, as said slippery condition was hidden from view and concealed by a heavy fall of snow; that the attention of appellees was called to said unsafe condition, and that it was hazardous, on that account, for appellant and the crew working with him in said construction to work in and about the construction of said bridge and trestle at that time; that appellees ordered that appellant and his crew proceed in the work of constructing said bridge and trestle; that said order was careless and negligent, in that, as aforesaid, it was dangerous to appellant and others working with him to be in and about said bridge, using the tools and appliances, and placing the heavy timbers in position; that while working in obedience to said order on said January 14, and while in the line of his duty, standing upon said bridge and upon a timber that was being moved by one of the men working with him, said timber, by reason of the slippery condition, slipped and fell and precipitated him to the ground thirty feet below, whereby he was injured; that said coemployees were working upon said bridge under the instructions of said appellees; that said order and instructions were negligent and careless, in that appellees should have ordered and instructed the men to suspend work until the ice and said slippery condition had been removed; that said acts of said coemployees were in obedience to said instructions and not otherwise, and by reason of said acts appellant was thrown off the bridge and injured; that said injuries were received on account of the acts of said coemployees while thus engaged in constructing said bridge, acting in strict obedience to the orders of said appellees.

The amended third paragraph contains substantially the same averments, except that it does not aver that appellant had no knowledge of the icy and slippery condition, but it avers that said icy and slippery condition was hidden from view by the snow, and also that appellant obeyed said order and instructions of the appellees without knowing and appreciating the dangers and hazards in prosecuting the work

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under the conditions that existed at that time, and that the order recited in the first paragraph was a careless and negligent order.

The answers to the interrogatories show that appellant had been in the employ of appellees as foreman of a crew of bridge carpenters, engaged in the construction of bridges, continuously since June, 1903; that he had charge of the construction of the trestle where the injury was sustained, the men under him, the manner of doing the work and the method of handling the timber in constructing the bridge; that prior to January 14, 1904, the date of the injury, said employes working with appellant and under his direction hoisted and stacked on top of said trestle lumber and stringers; that at the time said lumber and stringers were so hoisted they were covered with ice; that there was a slight rainfall, followed with sleet, snow and severe cold on the afternoon and night of January 13, 1904; that appellant, with other members of his crew, was working in the locality of said trestle on January 13, and each of them, on said January 13, knew of said rainfall, sleet and snow; that said sleet and snow covered the timbers, stringers and trestle, and rendered them icy and slippery; that said icy and slippery condition of said trestle and timbers rendered it dangerous for men to work thereon on the morning of January 14; that the icy, slippery and dangerous condition of the trestle and timbers was produced solely by a change in weather conditions which prevailed on the afternoon and night of January 13; that on the morning of January 14 the thermometer indicated zero weather; that on said morning two of the employes, before going to work on the trestle, notified appellant that it was dangerous to work thereon; that the workmen, under the orders of the appellant, swept the snow off the trestle before attempting to put the stringers in position; that appellant a short time before his injury went up on top of the trestle; that when he reached the top of the trestle the men were engaged in shifting a stringer into position;

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that said stringer at the time was covered with ice; that appellant upon reaching the top of the trestle took his position on the stringer that was being shifted into position, and his injury was caused by the slipping and falling of said stringer; that the icy and slippery condition of the trestle and timbers thereon was open and obvious, and anyone possessing good eyesight, and standing on the top of said trestle, could readily observe this condition on the morning of appellant's said injury, after the snow was removed; that appellant and appellees had equal opportunity of knowing the icy and slippery condition of the timbers and trestle, and appellant had as much information as appellees had touching the condition of said timbers and trestle on said morning, and full opportunity of knowing of such condition on said morning, and the liability of said timbers to slip and fall; that Hugh Bronson, appellees' timekeeper and supplyman, delivered to appellant on the morning of January 14 an order as follows:

"There are no new orders. The old order still stands. Go ahead and push the work on the trestle on the island."

That said Hugh Bronson had been in the habit, prior to said January 14, of bringing out from the headquarters of the appellees the orders as to what the appellant and the men under him should do on each day; that prior to this time appellant had never constructed a trestle in midwinter; that the laying of stringers on said trestle on said morning was attended with extraordinary hazard; that appellant had not been upon the trestle on the morning of January 14 before the time he was injured, and had been upon the trestle less than a minute when he received the injury.

The rules governing the force and effect of the answers to interrogatories, when interposed as a nullification of the general verdict, are so well established, and the authorities

1. ties so numerous and well known, that it would be unprofitable to recite them here. By the general ver-

dict in this case every material, well-pleaded fact of the complaint was found to be true. But if the answer to an interrogatory contradicts an averment of the complaint, such answer must be taken as the correct expression of the jury.

The basis of appellant's action is that the dangerous condition of the place of work was a latent or hidden one, and appellees, by a special, negligent order, directed ap-

2. pellant into the danger. It is shown by the complaint and answers to the interrogatories that the injury was caused by the icy and slippery condition of the timbers and tools; that this dangerous condition was occasioned by the inclement weather, and not by any act of omission or commission of appellees; that appellant knew of the rain, sleet, snow and the low temperature, and knew that when the timbers were hoisted to the top of the trestle they were covered with ice. The master is not required to be the eyes and ears of the servant, but the servant must use the senses with which he is endowed by nature (*Day v. Cleveland, etc., R. Co.* [1894], 137 Ind. 206; *Griffin v. Ohio etc., R. Co.* [1890], 124 Ind. 326, and cases cited), and must take cognizance of the laws of nature (*Fay v. Chicago, etc., R. Co.* [1898], 72 Minn. 192, 75 N. W. 15; *Louisville, etc., R. Co. v. Kemper* [1897], 147 Ind. 561).

It is the employe's duty to observe what is obvious and may be readily seen or known. He is not required to inspect or search for hidden defects or dangers. That

3. is the master's duty, and he has the right to rely upon the master's performance. He has also the right to rely upon the master's superior knowledge as to these matters. *M. Rumely Co. v. Myer* (1907), 40 Ind. App. 460.

But in the case before us it was as well known to the appellant as to the appellees that rain and sleet followed by zero temperature would cover timber, tools and ap-

4. pliances, as well as everything else exposed to it, with ice, and that such materials when so covered were liable to slip and slide when handled. These are the results

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of the laws of nature known to everyone of ordinary intelligence. As to these matters, the master could have no knowledge superior to appellant's, and the latter had no right to rely upon it. If the ice was thereafter cov-

5. ered with snow, it could not be said to be hidden or latent to one who had knowledge of the sequence of the weather conditions and changes. But, aside from this, the jury found that the icy, slippery and dangerous condition of the timbers on the trestle was open and

6. obvious; that one possessing good eyesight could readily observe this condition when the snow was removed. The snow was removed when he stepped upon the trestle. The ice was under him, around and about him everywhere. He could not look for a footing without seeing ice. It required no peering inspection or search to reveal it. The most casual glance would discover it as fully and completely as an hour's examination. At that moment, he had all of the knowledge of the conditions that the master could have had, and with this knowledge he proceeded with the work. The general rule is that where, as here, the conditions are not complex and the circumstances such as to be easily comprehended, an employe, who knows the facts, conditions and circumstances, is bound and conclusively presumed to know the dangers arising therefrom, and if, after such knowledge, he continues in such work, he is held to have assumed the risks thereby incurred, and if he is thereby injured the master is not liable. *M. Rumely Co. v. Myer*, *supra*; *Kane v. St. Louis, etc., R. Co.* (1905), 112 Mo. App. 650, 87 S. W. 571; *Shea v. Kansas City, etc., R. Co.* (1898), 76 Mo. App. 29; *Murphy v. Grand Trunk R. Co.* (1904), 73 N. H. 18, 58 Atl. 835; *English v. Chicago, etc., R. Co.* (1885), 24 Fed. 906; *Shaver v. Home Tel. Co.* (1905), 36 Ind. App. 233, 114 Am. St. 373; *Jenney Electric, etc., Co. v. Murphy* (1888), 115 Ind. 566; *Louisville, etc., R. Co. v. Sandford* (1889), 117 Ind. 265; *Louisville, etc., R. Co. v. Kemper, supra*; *Fay v. Chicago, etc., R. Co., supra*. It is

not the case of a servant compelled to act in an emergency. There was nothing to prevent him from exercising calm, deliberate judgment. He was the foreman in full charge of the men and the work. His orders were to go ahead with the work on the island; the particular place and manner and method of the work were left to him.

It is urged, that, since he suffered the injury in less than a minute after he reached the top of the trestle, he had no time to observe conditions and determine what to do. As we have seen, it took no time to observe conditions, and that he took no time to deliberate upon his course of action was no fault of appellees'. As a limitation to the general

7. rule before mentioned, it is the law that where the master commands the servant to go into a dangerous place and perform a dangerous task, or use a defective tool, at a particular time in a particular way, leaving the latter no discretion as to the time or manner of his performance, the servant may rely upon the command of the master at the master's risk, and not be put to the alternative of either quitting the employment or incurring danger at his own risk, unless the danger is so glaring and extreme as to be apparent to anyone, and one that a prudent man would not incur. *English v. Chicago, etc., R. Co., supra.*

In the case of *Jenney Electric, etc., Co. v. Murphy, supra.* the court say: "Where an employer commands his employe, whom he assumes to direct, to use a defective implement in a particular way, leaving the latter no discretion as to the time or manner of its use, the employe may rely upon the superior knowledge and experience of the employer, unless the defect is so glaring and extreme as to make the danger of using the utensil apparent to any one. On the other hand, when an employe has within his own control the manner of using an obviously defective tool, and the means of securing safety, if he chooses to employ them, if he neglects the means of security to himself he elects to take the risk. In such a case, it cannot in reason be said that the

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employe has acted upon the confidence reposed in the employer, and that he is, therefore, entitled to remuneration.”

It is insisted by the appellant that his case comes within the rule of special direction. But his complaint does not support this theory. The averment of the complaint

8. upon this point is “that defendants ordered and directed that plaintiff and his crew proceed in the work of constructing said bridge and trestle.” This order is of the broadest general character. There is no attempt, by other averments, to show that this order, either by its terms or by implication, was a specific direction to appellant on that morning to go upon the trestle and place the stringers in position. It was not a direction to go upon the trestle at all. It could as well have been construed as a direction to accumulate and prepare the timbers upon the ground or do any other work that might be done with safety. But it is urged that the jury, by its answers to interrogatories,

9. found that the order on that morning was a specific direction to go upon the trestle and place the stringers in position. Three interrogatories were submitted to the jury as to what the order was that was given to appellant on the morning of the injury. Two of them asked if the order, in substance, was that plaintiff and the men under him should proceed that morning to the top of the trestle and put the stringers in position? To which the jury answered “Yes.” The other asked the jury to set out the order in full, which the jury did as follows: “There are no new orders. The old order still stands. Go ahead and push the work on the trestle on the island.” Other interrogatories showed that some two or three days before the accident, Horace D. Hanford had said to appellant, in reply to appellant’s request for orders as to other work: “No, you keep on at that work. I want you to get it done as quickly as possible. I want you to hurry it up. Keep working at the trestle on the island. Push the work.”

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It is urged against the interrogatory that sets out the order, that it is the finding of an evidentiary fact. We do not so construe it. The fact that a certain order was

10. given was averred, and whether such an order was given was a fact to be found. And setting out the order *in totidem verbis*, where the language is clear and unambiguous, is surely as much a finding of fact as to set out the substance or its import, which involves a conclusion. The order, therefore, as averred and found by the jury, was not an order to do a specific thing at a specified time and in a specified manner. It was a general order to perform a general work in a manner to be chosen by the appel-

9. lant. It did not preclude him from exercising his own discretion. The character of the work and the manner and method of doing it were left to him, and when he went upon the trestle, and, with full knowledge of the conditions, directed the moving of the stringers, and took his position on the stringer that was being moved, knowing it was covered with ice, he assumed all the risks attendant upon the kind of work and the manner and method of doing it.

It is also suggested that appellees were negligent in not warning appellant of the danger and ordering him to cease work. As we have already seen, the danger was open

11. and obvious. The master is not required to warn the servant of a danger that is open and obvious to the senses and can be appreciated and understood by any one of ordinary intelligence. *Foster v. Bemis Indianapolis Bag Co.* (1904), 163 Ind. 351; *Atlas Engine Works v. Randall* (1885), 100 Ind. 293, 50 Am. Rep. 798; *Whitcomb v. Standard Oil Co.* (1899), 153 Ind. 513; 1 Labatt, Master and Serv., §238.

For the foregoing reasons the judgment is affirmed.

Watson, Rabb, Roby and Comstock, JJ., concur.

Myers, J., did not participate.

HILL ET AL., EXECUTORS, v. HILL.

[No. 6,851. Filed January 4, 1910.]

1. PARENT AND CHILD.—*Services.—Contracts.*—Parents are liable to their children where services were performed under an express contract to pay therefor, or, where the circumstances show the parents' purpose to pay, and the children's expectation to receive pay, therefor. p. 100.
2. PARENT AND CHILD.—*Services.—Contracts.—Evidence.*—Evidence showing that a daughter told her father that she was not satisfied, whereupon he told her he could do better for her at home than she could do "out in the world," and that she would be well paid for all she did there, supports a judgment rendered for services under an express contract. p. 100.
3. APPEAL.—*Weighting Evidence.*—On appeal the evidence most favorable to appellee, though contradicted, will be considered as true. p. 101.
4. APPEAL.—*Erroneous Instructions.—Curing by Interrogatories.*—Erroneous instructions given may be shown to be harmless by the answers to the interrogatories to the jury. p. 101.

From Dearborn Circuit Court; *William H. Bainbridge*, Special Judge.

Action by Mary E. Hill against Minerva Hill and others, as executors of the will of Abram Hill, deceased. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Givan & Givan and *McMullen & McMullens*, for appellants.

Thomas S. Cravens, John H. Russe and *James W. Noel*, for appellee.

PER CURIAM.—Appellee filed a claim against the estate of her deceased father, represented by appellants as executors of the will, for services rendered as housekeeper for him during his life, averring that the services were rendered under an express agreement on his part to pay therefor. There was a jury trial, resulting in a verdict in appellee's favor, and with the general verdict answers were returned by the jury to certain interrogatories propounded to them.

The questions presented by the appeal arise on the overruling of appellants' motion for judgment in their favor on the answers to the interrogatories and motion for a new trial.

As we understand appellants' contention in support of their motion for judgment on the answer to interrogatories.

it is that such answers affirmatively show that appel-

1. lee, during all of the time the services charged for were rendered, was a member of her father's family, and that therefore there could be no legal right to recover for the services rendered, even though an express contract to pay for them was shown. This is not the law. Where persons are living together as members of the same family, and sustain to each other the relation of parent and child, there may be a liability to pay for services on the one hand, or for board and lodging on the other, if there be an express contract so to do; or if, notwithstanding such relationship, the services were rendered or the board and shelter furnished under such circumstances as show that there was a purpose on one hand to pay therefor and an expectation on the other that it would be paid for. The answers to interrogatories are not in conflict with the general verdict. They affirmatively show that the services were rendered under a contract between the parties by which appellee was to be paid therefor.

A vast number of questions are raised and discussed in appellants' brief, on the action of the court below in overruling appellants' motion for a new trial. As to the admission or exclusion of evidence, we have carefully examined the record, and find no reversible error in the action of the court in ruling upon the evidence.

The reason for a new trial most earnestly pressed upon our consideration is that the evidence is insufficient to sustain the verdict, and we are cited to the cases of

2. *Brown v. Yaryan* (1881), 74 Ind. 305, *Hays v. McConnell* (1873), 42 Ind. 285, *McClure v. Lenz* (1907), 40 Ind. App. 56, *Zimmerman v. Zimmerman* (1889), 129

Pa. St. 229, 15 Am. St. 720, and *Dodson v. McAdams* (1887), 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408, in support of such contention. There is a marked distinction between this case and the cases cited. In this case, there was the direct and positive testimony of one witness that in 1889, at a time when appellee was proposing to leave her father and go into the millinery business for herself, decedent said to her: "Elizabeth, are you not satisfied?" And she said: "No, father, I am not." He thereupon said: "Elizabeth, I can do better for you at home than you can do out in the world making your own way; you will be well paid for all you do here."

In considering this question, this court must treat this evidence as absolutely true, however much it may be in conflict with other statements made by the witness, or

3. with the testimony of other witnesses, or with facts and circumstances. The evidence shows that appellee continued to stay with her father until his death. The jury was authorized to infer from this circumstance that, by the statement of her father, she was induced to stay, and was thus justified in finding the existence of an express contract to pay for the services.

It is urged also that the court erred in giving to the jury instructions four and five, asked by appellee. Instruction four is not susceptible of the construction given to it by appellants, and we find no objection to it.

The objection to instruction five is directed to the language: "If you find from a preponderance of the evidence that Abram Hill had promised the plaintiff to com-

4. pensate her, or in not permitting her to leave, that she would be compensated for any services," etc.

Whatever objectionable feature there may be to this instruction, it is rendered harmless by the answers returned by the jury to the interrogatories, in which it found that there was an express agreement made by the decedent to pay the appellee for her services.

We are unable to find any reversible error in the record presented in this case.

The judgment of the court below is affirmed.

CATHCART v. NEW DURHAM TOWNSHIP OF
LAPORTE COUNTY.

[No. 6,609. Filed January 4, 1910.]

1. REPLEVIN.—*Road Tools.—Township Trustees.—Road Supervisors.*—A township trustee, so long as there is a legal, qualified and acting road supervisor, cannot, on behalf of his township, maintain an action in replevin to recover possession of the road tools and other effects belonging to such supervisor's district. p. 103.
2. HIGHWAYS.—*Supervisors.—Changing Boundaries of District.*—The mere change of boundaries of the road districts in a township does not vacate the office of road supervisor, of one of such districts, where the supervisor still resides in such district. p. 103.

From Laporte Circuit Court; *John C. Richter*, Judge.

Action by New Durham Township of Laporte County, by Hiram B. Herrold, trustee, against Herbert Cathcart. From a judgment for plaintiff, defendant appeals. *Reversed.*

Frank E. Osborn, W. A. McVey and Lee L. Osborn, for appellant.

Weir, Weir & Darrow, for appellee.

HADLEY, J.—Appellee Herrold was trustee of New Durham township, Laporte county. Appellant was road supervisor of road district number four. In May, 1899, Herrold redistricted his township for road purposes, whereby the boundaries of district number four were changed, but appellant was left a resident of district number four, and with no other acting or qualified supervisor therein. Thereafter, the trustee conceiving that the change of the boundaries of district number four had ousted appellant from his office, and that there was therefore a vacancy, appointed one Winters to the office of road supervisor for district number

four, and he duly qualified. Herrold then demanded that appellant turn over to him the books, papers and tools pertaining to the office, on the theory that he (Cathcart) was no longer road supervisor, and therefore not entitled longer to hold them. This demand was refused. Appellee then brought suit to replevin the property, on the theory that the township was the owner of the property and entitled to the possession thereof.

The question is presented whether the suit is properly brought, it being in the name of the township by appellee

as trustee. There may be some virtue in this conten-

1. tion (*McIlwaine v. Adams* [1874], 46 Ind. 580; *State, ex rel., v. Wilson* [1888], 113 Ind. 501; *Vogel v. Brown Tp.* [1887], 112 Ind. 299; *Vogel v. Brown School Tp.* [1887], 112 Ind. 317), but it is not necessary for us to decide this question, as, under the facts stated, it is clear that appellee ought not to recover. Under §§6839-6847 Burns 1901, Acts 1883, p. 62, §§25-33, the road supervisor is made the custodian and held responsible for the care and safe-keeping of the property pertaining to his office, and is required, at the expiration of his term, to turn the same over to his successor in office; and, as long as there was a legal, qualified and acting road supervisor of the district, who was properly discharging the duties of his office, the township trustee had no right to the possession of the property, and consequently could not maintain a suit in replevin therefor.

In this case the appellant was the legal road supervisor. It was shown that he was duly appointed, that he duly

qualified, and that his term had not expired. The

2. mere change of the boundaries of his district, so long as it left him within its limits as changed, did not oust him from his office. We do not hold that by redistricting, and consequently abolishing, his road district, appellee might not have vacated the office of appellant, as this is not the case here. His district was not abolished, only the boundaries were changed. District number four still remained.

Appellant remained a resident of it, and his status as road supervisor of district number four was not changed, and he was entitled to the possession of the property sought to be recovered, so long as he continued in his office and in the proper discharge of the duties thereof.

Judgment reversed, with instructions to grant a new trial.

LEWIS v. HERSHEY, ADMINISTRATOR.

[No. 6,585. Filed January 4, 1910.]

1. **BASTARDY.—Title to Money Recovered.—Parent and Child.**—The money recovered in a bastardy proceeding belongs to the child and must be used for its benefit. p. 106.
2. **BASTARDY.—Recovery for.—Use of Money.—Trusts.**—Money can be recovered in a bastardy case only for the support of the child, and the mother ordinarily becomes its trustee for the use of the child. p. 106.
3. **BASTARDY.—Recovery for.—Trusts.—Notice.**—One who knowingly borrows money recovered in a bastardy case thereby becomes a trustee of such money, and is liable to such child. p. 106.
4. **BASTARDY.—Recovery.—Rights of Child.**—An illegitimate child, by its next friend, may maintain an action for money recovered for its benefit and improperly used. p. 107.
5. **TRUSTS.—Limitation of Actions.—Bastardy.—Money Recovered.**—Where the father of a daughter who recovered a sum of money in a bastardy case, borrowed such money, knowing of such recovery, he thereby becomes a trustee of such money, and the statute of limitations does not begin to run against an action therefor by such child until after his clear and unequivocal repudiation of such trust. p. 108.
6. **LIMITATION OF ACTIONS.—Infants.—Statutes.**—Infants have two years after attaining twenty-one years of age in which to maintain actions which would ordinarily have been barred (§298 Burns 1908, §296 R. S. 1881), and if the defendant dies during such two-year period, the time is extended eighteen months from the time of death, less the unexpired portion of such two-year period (§300 Burns 1908, §298 R. S. 1881). p. 109.
7. **BASTARDY.—Trusts.—Interest.—Parent and Child.**—One who knowingly borrows money recovered for, and belonging to, a bastard child, and who commingles such money with his own, for his own use, is liable for such money and interest thereon, but where

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such child was a member of the borrower's family. interest will be computed from the time such child ceased to be a member of the family. p. 109.

8. PARENT AND CHILD.—*Grandparents.—Grandchildren.—Services.*—In the absence of a contract a grandparent is not entitled to compensation for caring for his grandchild who is a member of his family. p. 110.

From Tippecanoe Circuit Court; *R. P. De Hart*, Judge.

Action by *Mattie Lewis* against *William H. Hershey*, as administrator of the estate of *Daniel Buck*, deceased. From a judgment for defendant, plaintiff appeals. *Reversed.*

Haywood & Burnett, for appellant.

Caldwell & Caldwell, for appellee.

WATSON, J.—The plaintiff filed her claim against the estate of said decedent for \$390 and interest thereon from January 9, 1885, alleging in the first paragraph that said sum was lent to said decedent by *Lucy Buck*, mother of claimant, on said date; that *Lucy Buck* died on December 22, 1886, and no administration was had on her estate; that said sum is due and unpaid. The second paragraph alleges that *Lucy Buck*, mother of claimant, departed this life December 22, 1886, leaving claimant as the sole heir; that no administration was had on said decedent's estate; that, at the time of her death, *Daniel Buck*, now deceased, was indebted to her in the sum of \$390 for money had and received; that said *Daniel Buck* thereby became indebted to this claimant for said sum of \$390 and interest. Both paragraphs allege that claimant became twenty-one years old on January 11, 1904, and that *Daniel Buck* died on June —, 1905. To the first paragraph appellee filed a set-off, alleging that claimant was indebted to the estate in the sum of \$50, funeral expenses of *Lucy Buck*, and \$25, medical bill for her last illness, both having been paid by *Daniel Buck*, deceased. The cause was tried by the court, a finding made for appellee, on which judgment was rendered, from which this appeal is prosecuted.

The record disclosed that claimant is an illegitimate child, and for her maintenance and support her mother, Lucy Buck, instituted a bastardy proceeding against Edwin Dill, and on October 29, 1883, she recovered judgment against said Dill for \$500; that out of said \$500 she paid her attorneys \$100, and turned over to her father, Daniel Buck, \$390, no part of which was ever paid to either Lucy Buck or to claimant. This claim is predicated and was tried

1. on the theory that money so received belonged to Lucy Buck, deceased, and it was necessary to show that this claimant's rights, if any, came by reason of being the heir of decedent. Bastardy proceedings, under our statute, are for the maintenance and support of the child so unfortunate as to be thus born, and for no other purpose. True it is that the money is paid over to the mother, but it is for the support and maintenance of her bastard child. *Beeman v. State, ex rel.* (1839), 5 Blackf. 165; *Hunter v. State, ex rel.* (1843), 6 Blackf. 383; *Marlett v. Wilson's Executor* (1868), 30 Ind. 240; *Canfield v. State, ex rel.* (1877), 56 Ind. 168.

If the child be still-born, then there can be no recovery for support. *Canfield v. State, ex rel., supra.* It is also true, that if the bastard child should die after judgment

2. had been rendered, on a showing of this fact to the court rendering judgment and before the expiration of the time limited for the payment of said judgment, the court may make such reduction thereof as is just. §1031 Burns 1908, §996 R. S. 1881. The mother becomes the trustee of the money so received for her infant child, unless "she be dead or an improper person to receive the same." §1027 Burns 1908, §992 R. S. 1881.

It is shown by one of the attorneys for the relatrix in the bastardy proceedings that Lucy Buck and Daniel Buck had some kind of an understanding or agreement as to this

3. money, and thereafter Lucy Buck gave a check on the Fowler-Chase Bank to Daniel Buck for \$390 of the money so received by her in said proceedings, and said

Daniel Buck indorsed said check and received said \$390. Decedent took this money under an arrangement between himself and Lucy Buck, the mother of claimant, "whereby the father wanted to take Lucy's money and keep it, or use it for her, or keep it for her, and use it in the purchase of land." He thereby became the trustee of said \$390 for said claimant, instead of for her mother, and for which his estate is liable.

Unlike many cases, where the question as to whether a trust exists, the money over which this dispute arose was trust money, created so by statute, regardless of whether the mother or grandfather held it. This is certainly true, when he took it, as he did, with full knowledge of the facts as to the source from whence it came. He was merely the custodian of the money. *Kane v. Bloodgood* (1823), 7 Johns. Ch. 90, 11 Am. Dec. 417; *Brown v. Maplewood Cemetery Assn.* (1902), 85 Minn. 498, 89 N. W. 872; *Taylor v. Benham* (1847), 5 How. (U. S.) *233, 12 L. Ed. 130. In the case of *Kane v. Bloodgood*, *supra*, Chancellor Kent said: "Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust."

This claimant, by a next friend, prior to becoming twenty-one years of age, could have recovered this money from decedent. In the case of *State, ex rel., v. Christian* 4. (1897), 18 Ind. App. 11, May Cecil, a bastard child of fifteen years of age, instituted the action to recover the \$400 that had theretofore been recovered by her mother, Martha Knapp, from Samuel K. Cecil, who was adjudged her father, and said sum was recovered in said proceedings from him for her support and maintenance. The money was paid to the clerk of the Delaware Circuit Court by said putative father and Archibald Knapp, who was wrongfully given a certificate, showing him to be the guardian of May

Cecil, by defendant Christian as clerk of the Hamilton Circuit Court, when, in fact, no such appointment had been made. The court held the complaint good, and that she was the proper relatrix.

It is insisted that this action should have been brought within six years from the date Daniel Buck received the money, and that the same is barred by the statute of 5. limitations. The fact disclosed by this record made Daniel Buck trustee of the funds so received by him, and the trust a continuing one. The rule is that the statute of limitations will not begin to run until the trustee has repudiated his trust. That money due to a ward and held by a trustee is permitted to remain in the trustee's hands does not change the nature of the debt nor bar the beneficiary. In other words, in order that the statute of limitations may begin to run and be available the repudiation of the trust must be clear and unequivocal. *Raymond v. Simonson* (1835), 4 Blackf. 77; *Thomas v. Merry* (1888), 113 Ind. 83; *Jones v. Henderson* (1898), 149 Ind. 458; *Stanley's Estate v. Pence* (1903), 160 Ind. 636; *Speidel v. Henrici* (1887), 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Chicago, etc., R. Co. v. Hay* (1887), 119 Ill. 493, 10 N. E. 29; 2 Perry, Trusts (5th ed.), §§863-865.

No repudiation or disavowal of his trust having been made by Daniel Buck, the statute of limitations did not begin to operate against the right of this claimant to recover her money so held in trust.

But assuming that the statute of limitations did operate against the claimant in this case, and did run during her minority, she had two years after the removal of her legal disability within which to bring this action. §298 Burns 1908, §296 R. S. 1881; *Bryson v. Collmer* (1904), 33 Ind. App. 494; *Barnett v. Harshbarger* (1886), 105 Ind. 410; *Sims v. Gay* (1887), 109 Ind. 501; *King v. Carmichael* (1893), 136 Ind. 20, 43 Am. St. 303.

Claimant became twenty-one years old on January 11, 1904, and filed this action March 17, 1906. Daniel Buck, the trustee, died June —, 1905. By §300 Burns 1908,

6. §298 R. S. 1881, the time for the bringing of this action was, by his death, thus extended the difference between the eighteen months and the unexpired portion of the two years' additional time allowed by statute after her legal disability had been removed, which shows that by virtue of the statute, the claim would have been filed in time if the statute of limitations applied. §300, *supra*; *McNear v. Roberson* (1895), 12 Ind. App. 87; *Harris v. Rice* (1879), 66 Ind. 267; *Knippenberg v. Morris* (1881), 80 Ind. 540.

The evidence shows that the trustee used the money and commingled it with his own for his own profit. Under such circumstances, as a general rule, he would be required

7. to account for interest at the legal rate, as provided by §7952 Burns 1908, §5200 R. S. 1881, which is as follows: "On money had and received for the use of another, and retained without his consent, interest shall be allowed at the rate of \$6 a year on \$100." In the case of *Stanley's Estate v. Pence*, *supra*, the court said: "As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and where good conscience requires that the trustee be charged with interest, the payment thereof ought to be exacted. *Miller v. Billingsly* [1873], 41 Ind. 489; *Pittsburgh, etc., R. Co. v. Swinney* [1884], 97 Ind. 586." In this case it is shown the claimant grew up to womanhood in her grandfather's home, as a member of his family. It is therefore equitable and just that this estate should be liable for interest from the date of her marriage only, the time she ceased to be a member of his family.

It is claimed by appellee that even though decedent re-

ceived the money, he was entitled to it for the support and maintenance of claimant. The record discloses the

8. fact that the claimant and decedent sustained the relation of granddaughter and grandfather to each other; that she lived with her grandfather from her birth until her marriage, as a member of his family, he furnishing board and clothing, and she, on the other hand, rendering services, even to working in the field. Therefore the presumption arises that the necessities and comforts of life so furnished by the grandfather and the services so rendered by the granddaughter were intended as mutual acts of kindness, and were gratuitously furnished and done. In the case of *James v. Gillen* (1892), 3 Ind. App. 472, the court said: "It is the policy of the law to inculcate harmony, confidence and affection in the domestic relation, and this can better be accomplished by permitting the sense of filial regard, in a large measure, to regulate the hearthstone economy, than by reducing it to a mercenary basis by applying the rules relating to master and servant. The doctrine applies with peculiar force to parent and child, and those occupying that relation by arrangement or adoption, and continues as long as the relation exists, regardless of the age of the parties. *Davis v. Davis* [1882], 85 Ind. 157; *Smith v. Denman* [1874], 48 Ind. 65; *Hays v. McConnell* [1873], 42 Ind. 285." This is true, regardless of the consanguinity or affinity, when the parties live together as one common family, as in this case. *James v. Gillen, supra*; *Collins v. Williams* (1898), 21 Ind. App. 227.

The judgment is reversed and cause remanded, with instructions to the trial court to sustain the motion for a new trial, and to proceed in this cause consistently with this opinion.

THAYER ET AL. v. KINDER ET AL.

[No. 6,811. Filed October 14, 1909. Rehearing denied January 4, 1910.]

1. CORPORATIONS.—*Insolvency. — Receivers. — Stockholders.* — A stockholder in a corporation which is in imminent danger of insolvency may maintain a suit for the appointment of a receiver thereof. p. 112.
2. APPEAL.—*Final Judgment.—Denial of Right to File Intervening Petition.—Corporations.—Stockholders.*—A judgment denying to stockholders in a corporation the right to intervene in a suit for the appointment of a receiver, and refusing them permission to file an answer or cross-complaint in the suit, is final and appealable. p. 113.
3. COURTS.—*Jurisdiction.—Appointment of Receivers.—Corporations.*—Where a stockholder of a corporation petitions for the appointment of a receiver and the corporation answers admitting the allegations and joining in the request for a receiver, the court has jurisdiction to enter a decree for such appointment. p. 113.
4. CORPORATIONS.—*Directors.—Discretion.*—The directors of a corporation have a discretionary power in the management thereof. p. 114.
5. ACTION.—*Parties.—Corporations.— Stockholders.— Receivers.*—Stockholders are equally bound by the action of the directors of their corporation, and have equal rights in suits for the appointment of a receiver, and one stockholder has a right to become a party in order to resist the appointment of a receiver where another has petitioned therefor. p. 114.
6. CORPORATIONS.—*Receivers.—Suits for.— Stockholders.*—A suit for the appointment of a receiver is purely equitable, and the property of the corporation, so far as the suit is concerned, is regarded as belonging to the individual stockholders. p. 114.
7. TRIAL.—*Intervening Petition.—Denial of Permission to File.— Discretion.—Presumption.*—Refusing to permit stockholders the right to file an intervening petition in a suit for the appointment of a receiver for the corporation, charges of fraud being made, three and one-half months after a receiver had been appointed by virtue of an alleged fraudulent agreement, is an abuse of discretion, the presumption in favor of the ruling of the trial court being overthrown by the uncontradicted and verified allegations of fraud. pp. 114, 115.
8. LACHES.—*Questioning Appointment of Receiver.—Corporations.*—Three and one-half months is not an unreasonable time for fifty-nine stockholders to use in preparing to set aside a receiver.

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ship obtained through the fraud of certain stockholders and the directors of a corporation. p. 115.

9. CORPORATIONS.—*Receivers.—Right to Object to Intervening Petition by Stockholders.*—A receiver of a corporation, appointed upon the petition of a stockholder, has no right to object to proceedings brought by other stockholders to obtain their rights. p. 116.

From Hancock Circuit Court; *George W. Galvin*, Special Judge.

Intervening petition by Edmund P. Thayer and others, against Charles E. Kinder and others. From a judgment for defendants, plaintiffs appeal. *Reversed.*

Forkner & Forkner and Downing & Hough, for appellants.

U. S. Jackson, Cook & Cook, and Felt & Binford, for appellees.

ROBY, P. J.—Appellee Kinder, on June 15, 1907, filed his complaint in the Hancock Circuit Court against the Citizens Natural Gas, Oil and Water Company, a corporation,

1. The object of the suit was to obtain the appointment of a receiver, on the ground that the corporation was in imminent danger of insolvency. Such proceeding is authorized by statute. §1279 Burns 1908, subd. 5, §1222 R. S. 1881. See *Hay v. McDaniel* (1901), 26 Ind. App. 683. Plaintiff Kinder averred that he was a stockholder in said corporation, and as such had a right to bring the suit. *Supreme Order, etc., v. Baker* (1893), 134 Ind. 293, 312, 20 L. R. A. 210. The corporation, by its board of directors, on said day filed an answer admitting the averments of the complaint and consenting to the appointment of a receiver. A decree was entered on said day appointing a receiver, who at once qualified. On September 28, appellants—fifty-nine persons representing themselves to be stockholders in the corporation—asked leave to intervene in said proceedings, presented their petition, an answer to said plaintiff's complaint, and a cross-complaint, which they asked leave to file.

Plaintiff Kinder, the corporation and the receiver objected to the proposed action, and the court refused to permit the intervening petition, answer or cross-complaint to be filed, and rendered judgment accordingly. From the judgment this appeal is taken. *Voorhees v. Indianapolis Car, etc., Co.* (1895), 140 Ind. 220.

The pleadings which were thus tendered are voluminous, and need not, for the purposes of this appeal, be set out. It is shown by the petition that the petitioners are stockholders in said corporation; that their material interests are involved in the proceedings; that the corporation was organized to mine for natural gas; that it had no authority to engage in any other business; that it has invested from \$60,000 to \$70,000 in said business; that the plant is a valuable one; that a large majority of its stockholders desire to preserve the plant and continue the business; that in April, 1907, said corporation had \$2,700 in its treasury and owed no debts; that it is entirely solvent and able to continue; that the officers and directors executed certain notes for \$3,700; that such notes are *ultra vires* and void, and made in pursuance of an attempt to change the object and purpose of said corporation; that plaintiff Kinder is the owner of a small number of shares; that he is one of the directors; that he acted in collusion with the other directors in filing said complaint, in the answer of the same, and in the appointment of a receiver without notice; that said directors fraudulently and negligently refused to defend said suit, but have confederated and colluded with said plaintiff for the fraudulent purpose of destroying said corporation and confiscating its property, and that the receiver heretofore appointed was ineligible, etc.

Appellees contend that the action of the board of directors was the action of the corporation, and bound it and its stockholders. That the court had jurisdiction to render judgment is true. *First Nat. Bank, etc., v.*

United States, etc., Tile Co. (1886), 105 Ind. 227; *Pressley v. Lamb* (1886), 105 Ind. 171. It is likewise true

4. that in the conduct of its affairs the directors of a corporation have discretionary power. But these propositions are not to the point. The stockholder who has standing to institute and maintain a suit of this class is as much bound by the action of the board of directors

5. as are other stockholders. It is therefore fair that other stockholders be permitted to become parties, and most especially where the plaintiff and the board are not adverse, the necessity for their appearance being founded upon the reason which ordinarily operates in favor of the plaintiff. The suit for a receiver is purely

6. equitable. "In equity, the property of a corporation is regarded as belonging to the individual corporators, and they are entitled to have their rights and interests in it protected by equitable relief." *Tipton Fire Co. v. Barnheisel* (1883), 92 Ind. 88, 90. See, also, *Morawetz, Priv. Corp.*, §403.

It is next insisted that the refusal of permission to intervene was a matter of discretion, and that a delay of three and one-half months in making the application, in

7. connection with the other facts of the case, justified its denial, and that every presumption must be indulged in favor of the ruling. Presumptions are always in favor of correct action, but when facts are shown presumptions cease to control. If the averments of the application are true—and being sworn to and not denied they must be taken as true—not only was there no ground for the appointment of a receiver, but the action taken was a fraud upon both the stockholders of the corporation and the court itself. Counter-affidavits were filed, but they do not negative the direct averments of facts before summarized.

Nor is there any question of laches. Three and one-half months is not an unreasonable time in which to determine

upon and take such action as had been taken by fifty-nine persons. If it shall be determined on trial that the appointment of the receiver was unwarranted, the property can be returned to the corporation without injury to anyone. Should the issue be determined otherwise, the costs of the proceeding will fall upon the appellants, and in either event a full hearing and a fair trial will be had.

It is not necessary to this decision to determine the sufficiency of the various pleadings filed and tendered, and the decision is limited to the holding that the facts shown required the admission of the appellant intervenors as parties to the suit.

The judgment is reversed and the cause remanded for proceedings in accordance herewith.

ON PETITION FOR REHEARING.

ROBY, J.—It is averred that the plaintiff in the cause wherein the receiver was appointed was a director of said company, and this averment was incorporated in the opinion heretofore filed. In the brief on the petition for rehearing it is said that he was, in fact, not a director. This may be conceded, and the averment is still sufficient. It is that he was owner of a small amount of stock, and that he acted in collusion with the directors.

The statement in the opinion, that the counter-affidavits filed do not negative the averments summarized in the opinion, was made advisedly. The affidavits referred to

7. consist very largely of conclusions. They may be taken as negating the existence of any moral turpitude, a quality which was in nowise intended to be attributed to any one concerned, but they do not furnish reason why the intervenors should not be permitted to participate in the legal proceeding which had for its purpose the change of control of their property.

It may be that the receivership is for the best interest of

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all concerned, and it most surely is to their interest that a full hearing be had. The objection by the present receiver, to the intervention of the petitioning stockholders, is unwarranted. It is not a matter of concern to him.

The petition for rehearing is overruled.

**BUFFALO OÖLITIC LIMESTONE QUARRIES COMPANY
ET AL. v. DAVIS ET AL.**

[No. 6,898. Filed January 4, 1910.]

1. **EVIDENCE.—Striking Out.—Varying Written Contracts.—Vendors' Liens.—Collateral Security.**—In a suit to foreclose a vendor's lien for purchase money, where the vendor had testified that she was not to lose her vendor's lien by taking a certificate of stock for \$5,000, and that such stock was taken as "conditional security," it is reversible error to refuse to strike out such testimony, where a written contract was admitted in evidence, showing that she was to receive "as collateral security for the final \$5,000 a certificate for \$5,000 in the stock" of a certain company, and was given an option of exchanging this stock for its par value in cash. p. 117.
2. **VENDOR AND PURCHASER.—Liens.—Waiver.**—A vendor waives his right to a lien by taking collateral security for the debt. p. 119.
3. **VENDOR AND PURCHASER.—Liens.—Revivor.—Written Contracts. Varying by Parol Evidence.**—A vendor's lien waived by the taking of collateral security cannot be revived; and a written contract accepting collateral security cannot be varied by parol testimony. p. 120.
4. **APPEAL.—Reversal.—Improper Evidence.—Special Findings.**—Where the special findings show that the judgment appealed from rests upon incompetent evidence, the judgment will be reversed. p. 120.
5. **EVIDENCE.—Admissibility.—Varying Written Contracts.—Parol evidence** is competent to show that a written contract has never gone into force, to invalidate it for fraud, to show an illegal consideration, and to supply a provision, not contradictory of, nor embraced by, the provisions therein. p. 120.

From Monroe Circuit Court; *J. B. Wilson, Judge.*

Suit by Mattie B. Davis against the Buffalo Oölitic Limestone Quarries Company and others. From a decree for

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plaintiff and others, such company and others appeal. *Affirmed in part. Reversed in part.*

Louden & Loudon, Frank L. Hume and Rufus H. East, for appellants.

Duncan & Batman and Theodore J. Loudon, for appellees.

COMSTOCK, J.—Appellee Mattie B. Davis commenced this suit in the court below to foreclose a vendor's lien on certain land in Monroe county, the title to which was held by appellant Buffalo Oolitic Limestone Quarries Company, then in the hands of a receiver. Appellee Loudon, appellants and other defaulted parties, were made defendants to plaintiff Davis's amended complaint, and to which they filed their separate answers, alleging (1) general denial; (2) payment of purchase money before suit; (3) that appellee Davis had waived her alleged vendor's lien, and, by further answer and cross-complaint, setting up their judgments and interests in said land. Replies and answers were filed to the cross-complaints. The cause was tried by the court, and, upon request, a special finding of facts was made and conclusions of law stated thereon, upon which a decree was entered, establishing a vendor's lien on the real estate in favor of appellee Davis for the sum of \$5,712.50, and fixing a lien thereon in favor of appellee Loudon in the sum of \$1,236.75, also a lien in favor of appellant Rachel D. Hedges, a judgment debtor, for \$11,432.59, and adjudging their priorities as follows: (1) Lien of appellee Loudon; (2) lien of appellee Davis; (3) lien of appellant Hedges. It is conceded by the parties that appellee Loudon is entitled to the first lien.

Among the errors assigned is the overruling of appellants' motion for a new trial. Of the reasons therefor

1. appellants insist that the court erred in the admission of certain testimony over their objections.

Upon the trial of the cause, appellee Davis testified as to the terms of the contract for the sale of the land to Mary

L. Danforth. She testified to an agreement which she claimed she had with Mary L. Danforth, to the effect that she was not to lose her lien for purchase money on the land by taking a certificate of stock for \$5,000 in the appellant limestone company, but was to hold said stock as "conditional security." Upon its appearing from the testimony that a written contract of sale had been made, appellants moved to strike out all of that part of appellees' parol testimony, which motion was overruled. The rule is not questioned that "when a contract has been finally committed to writing, all prior negotiations and stipulations between the parties are merged in the writing, and to that alone can the court refer to determine the rights and obligations of the parties." *Burton v. Morrow* (1892), 133 Ind. 221. And see *Reynolds v. Louisville, etc., R. Co.* (1896), 143 Ind. 579. The rule is clearly and comprehensively stated in 1 Greenleaf, Evidence (Lewis's ed.), §275, as follows: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' "

While the rule of law is not disputed, it is the claim of appellee Davis that, by the admission of said parol testimony, there was no attempt to abridge, contradict, change,

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modify or otherwise take from or add to said contract; that such testimony establishes a collateral parol contract, independent and apart from said contract of sale; that the collateral parol contract as to the nonwaiver of appellee Davis's vendor's lien did not modify or change the written contract of sale in any way; that it is in noway inconsistent with the written contract, etc. This question must be determined from the language of the contract, the pertinent provisions of which are the fifth and sixth items, reading as follows:

"(5) That at the time the court's favorable decision is rendered you shall receive as collateral security for the final \$5,000 a certificate for \$5,000 in the stock of the Buffalo Oolitic Limestone Company. (6) That when the final \$5,000 becomes due, you shall have the option of exchanging this collateral stock for \$5,000 in cash, or of retaining the stock as the final payment, in which latter case you shall be entitled to any dividends which may have been declared."

The terms of this proposal to purchase are full, definite and certain. It contains an expression of the intention of the parties and a meeting of the minds. Under this contract the sale was consummated and said certificate issued to appellee Davis.

The written contract describes the stock as "collateral security." By the parol testimony it is designated as "conditional security." If the stock was issued as col-

2. lateral security, as stated in the contract, it was a waiver of the vendor's lien. *Robbins v. Masteller* (1897), 147 Ind. 122; *Pennington v. Martin* (1897), 146 Ind. 635; *Haskell v. Scott* (1877), 56 Ind. 564; *Henes v. Henes* (1892), 5 Ind. App. 100; *In re Brentwood Brick, etc., Co.* (1876), 4 Ch. Div. 562; 29 Am. and Eng. Ency. Law (2d ed.), 763.

A parol agreement that it should not be a waiver was a direct attempt to vary the written contract in a way un-

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authorized by law. The lien, having been waived,
3. could not be revived. *Richards v. McPherson*
(1881), 74 Ind. 158; *Mattix v. Weand* (1862), 19
Ind. 151.

The court found that the \$5,000 in stock in appellant
company was delivered to appellee Davis as addi-
4. tional security for the unpaid purchase money. This
finding was based upon the improper parol testimony
to which we have referred.

There are qualifications to the rule that a written con-
tract cannot be varied by parol testimony, viz.: Parol tes-
timony is admissible to show that a contract of sale

5. has never come into operation as an enforceable obliga-
tion between the parties, or to invalidate it upon the
ground of fraud, or to show that it was in fact based upon
an illegal consideration, and where the written instrument
does not embrace the entire agreement, provided such evi-
dence does not contradict or vary the terms of the instru-
ment, but merely supplies what was omitted. None of these
qualifications are applicable in this case. The admission of
the parol testimony of appellee Davis, before referred to;
was, we think, a fatal error. Other alleged errors discussed
may not arise upon a new trial, and are therefore not con-
sidered.

Decree affirmed as to Theodore J. Louden. As to the
other parties, the decree is reversed, and the trial court is
directed to sustain appellants' motion for a new trial.

JENNINGS v. SHERTZ ET AL.

[No. 6,172. Filed June 8, 1909. Rehearing denied October 14, 1909.
Transfer denied January 4, 1910.]

1. CONTRACTS.—*Letters.—Statute of Frauds.*—A written contract
within the statute of frauds (§7469 Burns 1908, §4910 R. S. 1881)
may be made up of letters or telegrams, but a meeting of the
minds must be shown. p. 125.

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2. **CONTRACTS.—Letters.—Acceptance.**—A letter from defendant stating that he has booked an order from plaintiffs for a certain number of staves of certain dimensions, to be shipped in a certain manner, and specifying the method of payment, and an answer from the plaintiffs stating that they note the defendant's acceptance of the proposal for certain staves, and the method of shipment, and stating that they would load one car the next day, the defendant replying with directions of shipment, constitute a written contract, all of the letters being construed together. p. 125.
3. **CONTRACTS.—Performance.—Breach.—Conditions Precedent.—Refusal to Perform.—Complaint.**—A complaint alleging that the plaintiffs and defendant executed a contract, that the plaintiffs performed a part of such contract, and were prevented from performing the remainder thereof by the defendant, sufficiently alleges the performance of a condition precedent. p. 126.
4. **CONTRACTS.—Refusal to Perform.—Complaint for Breach.**—A complaint alleging that defendant repudiated and refused to perform the contract sued upon, need not show a performance, or offer to perform, by the plaintiffs. p. 127.
5. **CONTRACTS.—Breach.—Manufacturing Staves.—Complaint.**—A complaint alleging that defendant contracted with the plaintiffs for them to manufacture certain staves for the defendant, that they did so, but that they failed to load them on the cars, as provided by the contract, because the defendant withheld shipping directions, shows an executed contract on the part of the plaintiffs. pp. 129, 130.
6. **CONTRACTS.—Manufacturing and Shipping Goods.—Failure to Give Directions.—Agency.**—A person contracting with a manufacturing company for the manufacture and shipment of certain goods cannot by withholding shipping directions abrogate his contract, such company being merely his bailee or agent in the shipping of the goods. p. 129.
7. **CONTRACTS.—Manufacture and Shipment of Goods.—Delay in Shipping.—Estoppel.**—One who orders, in writing, certain goods to be manufactured and shipped at a certain time, is estopped to take advantage of a delay in shipment, where by a written order he has requested such delay. p. 130.
8. **CONTRACTS.—Executed.—Executory.—Complaint.—Demurrer.**—A demurrer for want of facts does not raise the question of repugnancy in a complaint for breach of contract, some of the paragraphs alleging an executory, and some an executed, contract. p. 131.
9. **CONTRACTS.—Severable.**—A contract for fifteen loads of staves to be shipped at separate times is severable. p. 131.
10. **APPEAL.—Briefs.—Want of Evidence.**—Appellant's failure to set out or narrate the evidence in his brief makes it discretionary with the Court, on appeal, to consider the evidence. p. 131.

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11. APPEAL.—*Technicalities*.—A just judgment will not be reversed on technicalities. p. 132.

From Henry Circuit Court; *John M. Morris*, Judge.

Action by Otto Shertz and another against Harry E. Jennings. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Forkner & Forkner, for appellant.

Milton McClure and *Barnard & Jeffrey*, for appellees.

HADLEY, C. J.—Appellees sued appellant to recover for the breach of a contract for the purchase of staves. The complaint is in four paragraphs, to each of which appellant filed a separate, general demurrer, and each was overruled. The first avers that appellees engaged in the manufacture and sale of staves in the town of Beardstown, Illinois, under the name of Beardstown Stave and Lumber Company; that appellant is a wholesale jobber in staves in the city of New Castle, Indiana, under the name of the New Castle Coil Hoop Company; that on July 26, 1904, appellant and appellees mutually agreed, by contract in writing, that appellant would purchase and take from appellees, f. o. b. cars at Beardstown, Illinois, fifteen carloads of mill-run, twenty-eight and one-half, mixed timber staves, cut six to two inches; that these staves were to be of elm, cottonwood, maple and sycamore, five carloads to be delivered in August, 1904, and the remaining ten carloads to be shipped in about equal portions during the months of September and October, for which staves appellant, by the terms of the contract, agreed to pay \$6 per thousand, one per cent off for cash if paid within ten days, otherwise to be paid by check within forty-five days from date of bill; that said contract is comprised of numerous letters, which letters are made a part of the complaint. It is then averred that by custom and usage 60,000 staves comprised a carload; that "15 cars M. R. 28- $\frac{1}{2}$," meant, and was intended by the parties to mean, fifteen cars containing 900,000 mill-run,

twenty-eight and one-half inch, mixed timber staves; that performance of this agreement was entered into by the parties, and appellees delivered to appellant two cars containing 120,000 staves; that the same were accepted and paid for by appellant; that appellees have fully performed, and have been at all times ready, able and willing to perform their part of said contract, but appellant, although duly notified, has wholly failed and refused to perform his said contract, in that he has failed to take and accept 575,000 of said staves. The damages sustained are specifically averred.

It is urged against the sufficiency of this paragraph that the letters exhibited do not constitute a written contract, and that the agreement to purchase was therefore within the statute of frauds and unenforceable. §7469 Burns 1908, §4910 R. S. 1881. The letters are numerous, and we will not endeavor to set them out in full. Briefly stated, they are as follows: On July 26, 1904, appellant wrote to appellees asking for lowest cash prices on fifteen cars of hardwood, twenty-eight and one-half inch, mill-run, six to two inch fruit staves. On July 27, appellees replied, referring to letter of appellant, quoting a price of \$6 per thousand f. o. b. cars Beardstown for fifteen cars mill-run twenty-eight and one-half inch mixed timber staves cut six to two inches, said staves being elm, cottonwood and sycamore. On July 27 appellant replied, asking for freight rates to Chicago, Cleveland, Rochester, New York, and Pittsburg, stating: "If you will give us these rates promptly, will advise you whether or not we can use staves offered. Also advise how you could make shipment of the fifteen cars of fruit-barrel staves." On July 30 appellees replied, that if they got the order for the fifteen cars they could ship two or three cars each week after September 15, adding: "We are now filling an order for same number of cars, and expect to stop cutting six to two inch when this is completed and cut five to two inch. So kindly let us know by return mail whether we shall keep

on and get fifteen cars out for you." On August 1 appellant replied as follows: "Replying to your favor of the 30th ult., would say that we could use these hardwood staves, but would want at least five cars of them shipped this month, and would take the rest of them during the months of September and October. If you can furnish us with the staves in this way, we would be pleased to hear from you."

To this appellees replied on August 6: "Replying to your favor of August 1, will say that we will furnish you, then, 15 car M. R. 28½" M. T. staves at \$6 per M., f. o. b. cars this city, five cars to be shipped this month, other ten cars during months of September and October. You may send us shipping directions for two cars to be shipped soon." On August 2 appellant answered: "Referring to your favor of the 6th, we have booked order from you of fifteen cars M. R. 28½" mixed timber staves, all to be thoroughly seasoned and good quality, at \$6 per thousand, five cars to be shipped during the month of August, and the remaining ten cars in about equal proportions during the months of September and October; terms, payment one per cent off for cash in ten days, or forty-five days. You will please enter our order, and ship at once one carload to ourselves at Grand Rapids, Michigan, having rate of freight stated on bill of lading, which should not be to exceed eleven or twelve cents." Thereupon appellees replied on August 9: "Yours of 8th at hand, and we note your acceptance of 15 cars M. R. 28½" M. T. staves, cut six to two", at \$6 per M., f. o. b. cars this city, five cars to be shipped this month, other ten cars during September and October. We also note your directions for one car to be sent to yourselves at Grand Rapids, Michigan. The rate to this point is sixteen cents. We note that you thought the rate would not be over eleven or twelve cents. This rate is the best we can get. We will load car to-morrow and next day, August 10 and 11." On August 11 appellant answered: "Referring to your favor of the 9th, received, note that you will make shipment of the Grand Rapids car

to-day. Please have rate inserted on the bill of lading, and send all papers to us.”

It is well settled that a written contract within the meaning of said section may be made up of letters or telegrams, but such writings must exhibit stipulations and con-

1. ditions upon which the minds of the parties met. If anything is left inchoate, unperfected or open for further negotiations, then it does not meet the requirements of the statute. If, however, from the whole correspondence it can be readily ascertained what the agreements of the parties were, the contract will be upheld. *Austin v. Davis* (1891), 128 Ind. 472, 12 L. R. A. 120, 25 Am. St. 456; *Thames Loan, etc., Co. v. Beville* (1885), 100 Ind. 309; *Roehl v. Haumesser* (1888), 114 Ind. 311; *Everitt v. Bassler* (1900), 25 Ind. App. 303; *Myers v. Smith* (1867), 48 Barb 614; *Commercial Tel. Co. v. Smith* (1888), 47 Hun 494; *Browne, Stat. of Frauds* (5th ed.), 345a-346; *Fairbanks v. Meyers* (1884), 98 Ind. 92; *Havens v. American Fire Ins. Co.* (1894), 11 Ind. App. 315.

The summary of previous negotiations and final proposition is found in appellant's letter dated August 2. It is clear that this letter is unconditionally accepted by

2. appellees' letter dated August 9. It is true that this letter repeats a portion of appellant's letter immediately preceding, and does not repeat all of its conditions; but this was not necessary, the rule being that where a proposition on one side is submitted by letter calling for an answer based on such proposal, the answer, though in writing, need not necessarily repeat all the terms and conditions embodied in the proposal. It is to be read in connection with the proposal to which it is a reply, and the whole together constitutes the contract between the parties. Such written reply is conclusive, so far as the terms are expressed, and if such reply, by its terms, shows an unconditional acceptance of the proposal, it will be held as an acceptance of the terms and conditions in the proposal not specifically

referred to in the reply, and in such case the reply will not be considered as an expression of the whole contract. *Beach v. Raritan, etc., R. Co.* (1868), 37 N. Y. 457; *Curtis v. Gibney* (1882), 59 Md. 131; *Calhoun v. Atchison* (1868), 4 Bush 261; *Georgia R., etc., Co. v. Smith* (1889), 83 Ga. 626, 10 S. E. 235. In the case last cited the court, referring to a contract made up of a series of letters and telegrams, used this language: "It is true * * * that if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition in every subsequent letter between the parties in order to preserve its force." The whole tenor of appellees' said letter is to the effect that they accept the proposition. After reciting sufficient of its terms to identify it, and referring to the shipping directions, it states: "We will load car to-morrow and next day, August 10 and 11." The averments of the complaint show that the contract was acted upon by the shipment of two carloads of staves, which were accepted and paid for by appellant under the contract. The letters meet the requirements of the rules, and constitute a written contract.

It is next urged that this paragraph of complaint is defective, for the reason that it does not sufficiently aver the performance of the contract on the part of appellees.

3. It does aver that appellees have fully performed and have been at all times ready, willing and able to perform their part of said contract, and were at all times, up to the bringing of this suit, ready, able and willing to deliver said staves according to the contract; that they were prevented from so doing by the acts of appellant, in that he failed and neglected to take and accept them. This is a sufficient averment of the performance of a condition precedent. §376 Burns 1908, §370 R. S. 1881; *Fairbanks v. Meyers, supra*; *Purdue v. Noffsinger* (1860), 15 Ind. 386; *Foster v. Leininger* (1904), 33 Ind. App. 669.

Furthermore, it is shown by the averments of the com-

plaint that appellant refused to perform his part of the contract and repudiated it. In such case, it was

4. unnecessary for appellees to allege performance, or readiness to perform, on their part. *Foster v. Leininger, supra*; *People's Bldg., etc., Assn. v. Reynolds* (1897), 17 Ind. App. 453; *Mathis v. Thomas* (1885), 101 Ind. 119; *Carter v. Carter* (1885), 101 Ind. 450; *Neal v. Shewalter* (1892), 5 Ind. App. 147.

It appears from the record that on November 23, 1904, appellees gave appellant notice that if he did not move the staves, which were at his disposal, within twenty days, they would proceed to sell them to the best advantage, and charge the difference between the price obtained and the contract price to appellant. The first paragraph of complaint was filed January 18, 1905. Afterwards, in February, 1905, appellees sold the staves, and thereafter, upon showing made and by leave of court, appellees filed the second, third and fourth paragraphs of complaint, to each of which appellant filed a separate general demurrer, all of which were overruled, and each of said rulings is assigned as error.

The second paragraph proceeds upon the theory of an executed contract. It contains the same averments as the first, with reference to the parties and as to the contract, and in addition to the letters made a part of the first paragraph makes other letters a part of said second paragraph. It is then averred that the staves thus ordered were not standard staves, but were unusual, and were not manufactured by appellees except upon special order; that, upon making said contract, appellees proceeded immediately to manufacture said staves, and did manufacture five carloads to be delivered in August, and five carloads to be delivered in September, and 95,000 of the staves of the five carloads which were to be delivered in October, making a total of 695,000 staves, all of which were manufactured by appellees in strict accordance with their contract with appellant; that said staves were manufactured by them especially for said appellant,

and were especially and separately stored in the warehouses of appellees at Beardstown, Illinois, at the time they were manufactured, separate and apart from other staves, for the sole use of appellant and in accordance with the terms of his purchase; that appellees omitted to manufacture the remainder of said staves at the special instance and request of appellant; that appellant was repeatedly notified that said staves were manufactured and ready for him, and shipping directions were asked for, but appellant refused to give such shipping directions except for two cars, although he promised repeatedly to give such directions up to October 28, but on November 20 denied his contract and any liability thereunder; that appellees gave notice to appellant that they would sell said staves within twenty days; and that they did so sell them at the best price obtainable—\$3.75 per thousand.

The letters made a part of this paragraph are the same as those made a part of the first paragraph, the last of that series being dated August 11, from appellant to appellees, acknowledging receipt of a letter advising him of a shipment of the first carload. Also a series of letters from appellees dated respectively August 10, 12, 16, September 1, on September 10 both telegram and letter, September 14, 19, 21, 24, 28, October 5, 24, November 4, 23, 28, December 20; and letters from appellant dated August 17, September 12, 23, October 28, November 24, December 23. Many of the letters from appellees were in the same strain, notifying appellant that the staves were ready, were at his disposal, were occupying their warehouses, were in the way, and all persistently requesting shipping directions. Those appellant wrote were evasive, full of excuses and explanations, and contained promises of shipping instructions soon, and requests for more time. In the letter of November 23, appellees formally notified appellant that the staves were at his disposal, and if not moved within twenty days, appellees would sell them at the best price obtainable and look to him for the

difference between the selling price and the contract price. In his letter of December 23, appellant informed appellees that he would not do anything with the staves; that he had found that he was not legally bound by the contract; that if appellees would investigate they would find that there was a law in Indiana to the effect that to make a contract legally binding it is absolutely necessary for the buyer and seller to agree upon every point in the transaction, and directly repudiated his contract and denied any liability thereunder. This he again reiterated in his letter of December 26.

It is urged against this paragraph that it does not show performance. It shows by specific averments, with the letters made a part thereof, that appellees manufactured

5. the staves in strict compliance with the contract, and set them apart, at the place agreed upon, subject to appellant's order. It is shown by the construction placed upon the contract by both parties, that appellees had done all they were required to do except to place the staves upon the cars, and this they were prevented from doing by appellant's withholding shipping directions. This exhibited an executed contract under the rules laid down in the following cases: *Johnson v. Powell* (1857), 9 Ind. 566; *Martz v. Putnam* (1889), 117 Ind. 392, and cases cited; *Whitcomb v. Whitney* (1872), 24 Mich. 486; *Ballentine v. Robinson* (1863), 46 Pa. St. 177.

In the case before us, it appears from the averments of the complaint, taken with the exhibits, that the staves were to be specially cut and separated by appellees, and

6. loaded on the cars and shipped to a point designated by appellant. While there is no direct stipulation as to the shipping directions, the correspondence, made a part of the complaint, evidently shows that this was the understanding of both parties. When, therefore, appellees specially cut and separately stacked the staves, awaiting shipping

orders, they had performed all they were fairly required to do on their part. In placing the staves upon the cars, upon the orders of appellant, they were acting as bailees or agents for the owners (*Terry v. Wheeler* [1862], 25 N. Y. 520; *Riddle v. Varnum* [1838], 20 Pick. 280; *Martz v. Putnam, supra*), and appellant could not, by withholding shipping directions, abrogate the contract and escape liability thereunder. *Schreiber v. Butler* (1882), 84 Ind. 576.

This paragraph shows that if there was a postponement of delivery it was at the request of appellant in writing. He

cannot complain of this. And he cannot complain

7. that this paragraph of complaint does not show that he knew when to accept, since it does show that he was notified that the staves were held at his disposal and would be shipped on his direction.

The third paragraph of complaint counts upon an executory contract, and the averments of the complaint are substantially the same as the first paragraph, except that

5. all the letters that are made a part of the first paragraph, together with those that are made a part of the second, are also made a part of the third; and except also, that it avers that the time of delivery, by mutual consent and agreement of the parties, was changed to November 20. It is urged that it is not shown that this change was in writing. This charge is not sustained. The letters, made a part of this paragraph, show that appellees were insisting that appellant move the staves, and appellant was, in effect, begging for time.

The fourth paragraph contains the same averments as the second, and the additional averment that an agent of appellant appeared at the factory of appellees, examined, inspected and received said staves for appellant, and promised to have said staves moved in a few days. Said paragraph is held sufficient for the same reasons as the second.

It is urged that the demurrers to the second and fourth paragraphs should have been sustained, for the reason that

appellees, having elected to sue on an executory contract, were therefore estopped to assert that it was an executed contract. This question is not raised by a demurrer for want of facts. The paragraphs in themselves showed no repugnancy and no facts that might be said to create an estoppel.

It is also urged against each of these paragraphs, that the contract was for fifteen cars of staves; that it is not severable; that appellees cannot sue as on an executed contract, and aver that only a part of the contract was executed. This rule might be applicable if appellees were suing to recover the contract price for fifteen carloads of staves. This, appellees are not doing. The contract was for specially made goods in carload lots, to be delivered at different times, as ordered. This makes a severable contract. *Rainbolt v. East* (1877), 56 Ind. 538, 26 Am. Rep. 40; *Neal v. Shewalter, supra*; *Higham v. Harris* (1886), 108 Ind. 246.

Objections are made to the giving and refusing to give certain instructions. What we have here said in our discussion of the law as applicable to the various paragraphs of the complaint disposes of the substantial question involved with reference to said instructions, and it would be unprofitable to extend the discussion.

It is urged that the evidence is insufficient to support the verdict under the decisions. There is no statement of the record in narrative form, and we are not required to

consider this question. *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379; *Welch v. State, ex rel.* (1905), 164 Ind. 104. However, we have carefully read the evidence. It not only sustains the verdict, but we think appellant should congratulate himself that the verdict was as light as it was. The contract was fair when made, and fully understood, and the only defense of appellant is that, technically, he is not liable, because the letters did not make a written contract. There is no claim that appellees were unfair or dishonest either in method of business or

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manner of performance. In fact, the evidence is undisputed that appellees, so far as they were permitted, fully performed their part of the agreement, and at the same time were endeavoring in every way to protect appellant and save him from loss—in this respect exhibiting a decided contrast to appellant.

We do not deem it necessary to discuss the various questions sought to be presented on the evidence, as each 11. is so purely technical that it could in no way affect the substantial merits of the cause. We find no reversible error in the record.

Judgment affirmed.

TERRE HAUTE TRACTION AND LIGHT COMPANY
v. PAYNE.

[No. 6,808. Filed October 12, 1909. Rehearing denied January 5, 1910.]

1. CARRIERS.—*Interurban Railroads.—Negligent Starting of Cars.—Complaint.*—"At or Near."—A complaint by a passenger alleging that defendant interurban railroad company stopped its car "at or near" the plaintiff's destination, that passengers began to alight, that the plaintiff attempted to alight, and that while so doing defendant negligently started the car with a jerk, throwing and injuring her, sufficiently shows that the car had reached the plaintiff's destination and that the plaintiff was justified in attempting to alight. p. 135.
2. CARRIERS.—*Passengers.—Injuries to.—Instructions.*—An instruction that a passenger using ordinary care herself, may assume that she will be transported to her destination and be permitted to alight in safety, and that if the carrier should announce that the next stop would be her destination, she might assume, when the car again stopped, that it was the regular station where she might alight without fear of a sudden start, and that if in attempting to alight the car was suddenly started, injuring her, she should recover. "providing, the plaintiff has proved the other material allegations of her complaint by a preponderance of the evidence," is not misleading, where the negligence alleged was that of starting the car before she had alighted. p. 136.

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3. **CARRIERS.—Passengers.—Care in Alighting.**—A passenger is required to use ordinary care in alighting from the car. p. 138.
4. **CARRIERS.—Discharge of Passengers.—Stations.**—A carrier that stops its car at an improper stopping place, after announcing the next stopping place as the plaintiff's destination, is under the same duty of discharging its passengers safely as though such place were the regular station. p. 138.
5. **CARRIERS.—Care Toward Passengers.—Instructions.**—An instruction that while a carrier is not an insurer of the safety of its passengers, nevertheless, it is bound to use the highest practicable care in reference thereto, and is liable for the slightest neglect, is correct. p. 138.
6. **CARRIERS.—Inviting Passengers to Alight.—Stations.—Instructions.**—An instruction that the stopping of a car, after giving the usual signal for the regular stopping place, is an invitation to the passengers to alight, is not erroneous. p. 139.
7. **CARRIERS.—Passengers.—Negligent Discharge of.—Instructions.**—An instruction that a passenger is not required to anticipate the carrier's negligence, and that if the conductor stops the car, after having announced the next stopping place as the passenger's destination, the passenger has a right to assume that she may safely alight, and is not bound to apprehend that her safety will be endangered by a sudden start, is correct, the passenger having a right to rely upon the instructions of the conductor. p. 139.
8. **CARRIERS.—Passengers.—Discharging.—Outlining Facts Authorizing Recovery.—Instructions.**—An instruction setting out the facts authorizing a passenger to recover for injuries sustained in attempting to alight from defendant's car, but omitting to use the word "negligent," is not bad, where it also charges that the recovery is conditioned upon proof of the other allegations of the complaint, one of which was that the defendant negligently started the car with a jerk that caused the injury. p. 140.
9. **CARRIERS.—Passengers.—Alighting.—Instructions.**—An instruction stating what acts of defendant's motorman would constitute negligence, and disregarding the element of knowledge, is not bad, since the motorman is presumed to know of the acts of passengers in alighting from the car. p. 141.
10. **CARRIERS.—Passengers.—Injuries.—Other Sickness.—Damages.—Instructions.—"Fair Preponderance" of Evidence.—"Satisfaction" of Jury.**—An instruction that no damages should be given to a passenger on account of sickness subsequent to injuries received, where the sickness was not caused by the injuries, and that if the plaintiff has proved the allegations of her complaint "to the jury's satisfaction" by a "fair preponderance" of the evidence, she is entitled to recover, is not unfavorable to the defendant. p. 141.

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11. **CARRIERS.—Acts of Agents.—Injuries to Passengers.—Liability.—Instructions.—Insurers.**—An instruction that a carrier is responsible for the manner in which its servants act in carrying passengers, and if passengers are injured by reason of the wrongful conduct of such servants, such carrier is liable, does not make the carrier an insurer. p. 142.
12. **CARRIERS.—Evidence.—Hypothetical Questions.—Basis.—Instructions.**—An instruction that if the jury should find that the facts assumed in a hypothetical question are not all proved, such testimony would be correspondingly weakened, and that if none of such facts were established such evidence might be wholly disregarded, is correct. p. 143.
13. **TRIAL.—Interrogatories.—Requests for.**—Giving to the jury certain interrogatories headed by a request by defendant that they be submitted, is open to adverse criticism, but does not constitute reversible error. p. 143.
14. **TRIAL.—Instructions.—Duplication.**—Instructions need not be duplicated. p. 144.
15. **NEW TRIAL.—General Reasons for.—Contributory Negligence.—Burden of Proof.—Instructions.**—That the instructions as to contributory negligence and the burden of proof in establishing it are confusing, contradictory and misleading, is too general for an assignment as a ground for a new trial, and presents no question, and should, in any event be disregarded, where the record shows that the instructions fully and fairly placed the case before the jury. p. 144.

From Putnam Circuit Court; *G. C. Moore*, Special Judge.

Action by Emma A. Payne against the Terre Haute Traction and Light Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

McNutt & McNutt, A. W. Knight, S. A. Hays and W. H. Latta, for appellant.

Albert Payne and Warren E. Payne, for appellee.

COMSTOCK, J.—The amended complaint is in one paragraph, and, as originally filed, made both the appellant and the Terre Haute, Indianapolis and Eastern Traction Company defendants. The negligent act charged, is that the car was stopped at plaintiff's destination to allow passengers to alight therefrom; that the plaintiff thereupon arose from her seat and attempted to pass out of said car; that, while

she was in the act of walking from the place where she had been seated to the door of the car, the car was negligently started with a sudden jerk, causing her to be thrown to the floor and injured. The action was dismissed as to the Terre Haute, Indianapolis and Eastern Traction Company. Appellant's demurrer for want of facts was overruled, and the cause put at issue by a general denial. A trial by jury resulted in a verdict in favor of appellee against the appellant in the sum of \$4,500. With the general verdict answers to interrogatories were returned.

The errors assigned are the overruling of appellant's demurrer to the amended complaint and its motion for a new trial.

The demurrer contains two specifications. Only the first, "that the complaint does not state facts sufficient to constitute a cause of action," is discussed. The com-

1. plaintiff is objected to as alleging only that the car stopped "at or near" a point at which plaintiff desired to alight, that she thereupon and without delay arose from her seat and started toward the door, that the car started before she reached the door; that it does not allege that the car had stopped at the regular stopping place, or that it had stopped for her to alight, or for passengers to alight at that point; that the charge is in the alternative "at or near," and that the appellee's ticket entitled her to ride to Sixth street—the point to which appellant had agreed to carry her, and at which it had a right to expect her to alight—and that it was not charged, by law, with any duty to anticipate that appellee would arise and attempt to alight before the car reached that point. The language of the complaint to which the objections are addressed is as follows: "Plaintiff became a passenger on one of defendant's cars running from Forest avenue in the city of Brazil, Indiana, on the line of its road, to Sixth street in the city of Terre Haute, Indiana, and then and there paid the full fare charged by said defendant to be transported from said city

of Brazil, Indiana, to said Sixth street in the city of Terre Haute; * * * that while plaintiff was a passenger on said car, and when said car came near Sixth street of said city of Terre Haute, Indiana, at plaintiff's point of destination on said line of road, the same was by said servants of said defendant stopped, and passengers thereon began to alight therefrom: that as soon as said car was so stopped at said point this plaintiff arose from her seat in said car and attempted to walk and pass out of the same and alight therefrom, and was in the act of walking from her said seat to the door of said car, for the purpose of alighting therefrom, and that while so walking toward said door, being herself in the exercise of due care for her own safety, and without unnecessary and unreasonable delay on her part, said car was, by said servants of defendant in charge and control of the same, negligently and carelessly, without giving any notice, signal or warning, set in motion, then and there causing said car suddenly and unexpectedly to jerk and lurch violently with a backward and forward movement, whereby," etc. This language does not sustain said first and second objections. As to said second point, the complaint alleges that the defendant company ran its cars from Brazil, Indiana, to Sixth street in Terre Haute, Indiana; that plaintiff paid her fare between said points, which may fairly be construed as charging that the cars had arrived at their place of destination. But, apart from this, it appears that the car had come to a full stop, and other passengers were alighting and plaintiff was attempting to alight.

It is argued that the court erred in giving instructions three, four, four and one-half, five, seven and eight requested by plaintiff. Said third instruction is objected to as

2. omitting the following essentials to recovery: (1)

That said car was negligently started; (2) that plaintiff was in the exercise of ordinary care; (3) that the injuries received were the proximate result of defendant's negligence. The objection made makes it proper

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to set out the instruction, which reads as follows: "Every person who is received as a passenger upon the cars of a common carrier and has paid the required fare for transportation, has the right to assume that he will be carried to his destination safely, and that he will be allowed to alight from such conveyance in safety, and he is not required to exercise more than ordinary care in alighting from such conveyance. So in this case, if you find * * * that on December 13, 1905, the defendant was a common carrier of passengers for hire; that the plaintiff was a passenger; * * * that she had paid the required fare, * * * and if you further find that on said day the defendant's employes * * * stopped the car at or near Sixth street in the city of Terre Haute, and permitted persons to alight from said car, and that the conductor had announced the next stop to be Sixth street, then the court instructs you that the plaintiff had a right to assume that the point at which said car stopped was the regular stopping place for defendant's cars for the discharge of passengers, and that she would be permitted to alight from said car before it would be again started; * * * and if you find * * * that the point where said car stopped on said day was not the regular stopping place, and * * * that the plaintiff was attempting to alight from said car in the usual careful and prudent manner, and that the employes of the defendant * * * suddenly and without notice or warning, set the car in motion while plaintiff was in the act of attempting to alight, * * * and that the plaintiff received the injuries complained of in her complaint—then the court instructs you that you should find for the plaintiff, providing, that the plaintiff has proved the other material allegations of her complaint by a preponderance of the evidence."

The negligence charged in the complaint is that the defendant failed to permit plaintiff to alight in safety. No complaint is made that she was not carried safely to her destination. The instruction in effect states that a passenger

is only required to exercise ordinary care in alighting. The right to recover is predicated upon the negligent starting of the car while plaintiff was attempting to alight. The language used is: "And if you further so find from a preponderance of the evidence that the plaintiff was attempting to alight in a careful and prudent manner," etc. The measure of care under consideration is that care which a

3. person of ordinary prudence, acting under like circumstances or similarly situated, would use. The language employed is not strictly within the rule, but we cannot say that, taken in connection with other instructions given, it was misleading. The instruction does not in terms attempt to recite all the facts necessary to warrant a recovery. It does charge that if the plaintiff has proved the other material allegations of her complaint by a fair preponderance of the evidence, she ought to recover.

The element of negligent starting of the car was incorporated in other material allegations of the complaint.

Whether or not the car stopped at a regular stopping place would not be material, if appellant had announced the next stop to be Sixth street, and permitted passengers to alight there. The appellant was under the same obligations to protect passengers getting off there as at any other place.

Said fourth instruction, it is claimed, informed the jury that while a common carrier is not an insurer of the absolute safety of its passengers, in legal contemplation, it

5. does undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect, resulting in injury to the passenger, if the passenger is, at the time of the injury, exercising ordinary care for her own safety. The instruction was correct.

Said instruction four and one-half reads: "Bringing the car to a full stop near the regular stopping place, after having given the usual signal indicating the arrival at the

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stopping place, is an implied invitation to the passengers to alight." In this there was no error. *Terre Haute, etc., R. Co. v. Buck* (1884), 96 Ind. 346, and cases cited.

The fifth instruction reads: "The plaintiff was not bound to apprehend any carelessness or lack of care on the part of the defendant. And if you further find that before stopping, and being near the place where the car stopped, the defendant's conductor had announced that the next stop would be Sixth street, plaintiff had a right to rely, when said defendant stopped its car and passengers were being discharged therefrom on said date, that said car would not be started until she was safely off the same. She was not bound to apprehend that the motorman might start the car, while she was walking down the aisle and attempting to gain the rear platform of the car on which she was riding, before she had reached a position of safety. She was not bound to apprehend that the defendant might do anything that would place her in jeopardy; on the contrary, she had a right to place full reliance on the defendant's doing its full duty towards her, and exercising the highest degree of care which the law requires of it for her protection." This instruction is objected to as assuming the existence of certain facts, *e. g.*, that she was walking down the aisle of the car, and that she was going towards the rear platform; that she had not reached a place of safety, and inferentially assumes that it was dangerous to start the car at that time; and, as invading the province of the jury; that it is erroneous for the further reason that it is a misstatement of the law as applied to the facts of this particular case.

The pith of the instruction is that it would not be negligence for appellee, under the circumstances, to act upon the instructions of the conductor. The instruction is to be considered in connection with other instructions and the facts as proved. Appellant was bound to exercise the highest degree

of care and skill possible for the safety of appellee, and she had the right to rely upon appellant's discharging this duty, and to act on the belief and reliance that it would do so, unless the danger was so apparent that no person of ordinary prudence would incur it. In other words, it can not be negligence on the part of a passenger to rely upon the instructions of the conductor, unless such reliance would lead to known perils which an ordinarily prudent person would not incur. *Anderson v. Scholey* (1888), 114 Ind. 553; *Bradbury v. Goodwin* (1886), 108 Ind. 286.

Instruction seven is objected to because "it instructed the jury that the plaintiff may recover upon certain facts, and omitted the element of negligence in the doing of the 8. act; that she may recover, provided the car was started forward while she was alighting, absolutely regardless of whether the acts of stopping and starting the car were or were not negligent acts, and for the reason that it leaves the jury free to determine for itself what are the material allegations of plaintiff's complaint." As to omitting the element of negligence, it must be conceded that the particular word is not used. But the jury is instructed that it might find for the plaintiff, providing she had proved the other material allegations of the complaint. One of the material allegations of the complaint is "that the act was negligently done." The second objection is not sustained by the decisions of this State. *Pittsburgh, etc., R. Co. v. Collins* (1907), 168 Ind. 467; *Southern Ind. R. Co. v. Peyton* (1902), 157 Ind. 690; *Pittsburgh, etc., R. Co. v. Lighthouse* (1907), 168 Ind. 438; *Pittsburgh, etc., R. Co. v. Ross* (1907), 169 Ind. 3; *New Castle Bridge Co. v. Doty* (1907), 168 Ind. 259. In the case last named the court, at page 266, said: "Complaint is made of the second instruction because it informed the jury that the appellee might recover if he had proved by a fair preponderance of the evidence the material allegations of one or both paragraphs of the complaint. It is claimed that this instruction is bad for two reasons:

(1) Because it does not set forth what constitutes the material allegations of the complaint; (2) it omits the elements of assumed risk and contributory negligence. Neither of these objections is tenable. It is not erroneous to express an instruction in general terms, if the expressions employed are correct within their own limitation. It is only when an instruction purports to state specifically all the material averments of a pleading that it becomes erroneous to leave one or more of such averments unstated."

The eighth instruction is objected to on the grounds that it invades the province of the jury, and states what conduct on the part of the appellant's motorman would constitute actionable negligence, and also that it disregards the element of knowledge by the motorman of appellee's position, and whether there was any apparent danger to her at the time he started the car. In law, appellant's servants knew that appellee was going out of the car, and that to start the car in the manner alleged would put her in peril. The instruction is conditional upon the use of reasonable care and diligence by appellee as she moved forward toward the door to alight from the car. The objections are not well taken. It is also objected to for the reason that it left it for the jury to determine what were the material allegations of the complaint. As the same objection is made to the seventh instruction, it is not deemed necessary further to refer to it.

Objection is also taken to instructions one, four, five and seven, given by the court of its own motion. Instruction one is as follows: "It is not essential to the plaintiff's

10. right of recovery in this action that all of the sickness that she has had since the date of her alleged injury was caused by said injury. It is sufficient to entitle her to a verdict in her favor, if she has proved to your satisfaction, by a fair preponderance of the evidence, that she sustained an injury by the negligence of the defendant, its agents and servants, and without any negligence on her part, at the

time and in the manner alleged in her complaint. The fact, if it is a fact, that she, after such injury, fell sick from causes unconnected with her injury, if you find from a fair preponderance of the evidence that she sustained an injury, should not, nor should the symptoms resulting from such sickness, be considered by you in assessing her damages."

The objection is that it commands the jury to exclude from their minds, in assessing the plaintiff's damages, the fact that she fell sick, after her injury, from causes unconnected therewith, and that they should exclude the symptoms resulting from such sickness. We cannot see that appellant had any reason to complain of this portion of the instruction. The jury was told to award no damages to plaintiff for any matter named in that part of the instruction. The instruction is further objected to upon the ground that the words, "it is sufficient to entitle her to a verdict in her favor if she has proved to your satisfaction, by a fair preponderance of the evidence," etc., are used. The words to the "satisfaction" of the jury are equivalent to "find" or "believe," and there was no error in their use in this connection. *Callan & Co. v. Hanson* (1892), 86 Iowa 420, 53 N. W. 282, *Sams Automatic Car Coupler Co. v. League* (1898), 25 Colo. 129, 54 Pac. 642; *Kenyon v. City of Mondovi* (1897), 98 Wis. 50, 73 N. W. 314; *Torrey v. Burney* (1896), 113 Ala. 496, 21 South. 348.

Said fourth instruction reads: "If the plaintiff was a passenger upon one of the defendant's cars, as charged in the complaint, and defendant's obligation was to

11. carry her safely and properly, and if the defendant entrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which said servants execute it. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured." It is insisted that the instruction makes the appellant the

insurer of the safety of the passengers. We think it could not have been so understood. It plainly tells the jury that the appellant is responsible for the manner in which its servants discharge their duties, and that a carrier is responsible for the wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured.

In the fifth instruction the court, in referring to the opinions given by expert witnesses upon hypothetical questions, said: "If you find that any of the facts embodied

12. in the questions submitted to these witnesses, or either of them, has not been proved, then the weight to be given the evidence of each is weakened by so much, at least, as the facts are not proved. If you find that none of the material facts embodied in said questions are proved by a fair preponderance of the evidence, then you may disregard said evidence as worthless." The instruction is sustained by the authorities. *Filer v. New York Cent. R. Co.* (1872), 49 N. Y. 42; *Bradley v. State* (1869), 31 Ind. 492; *Hovey v. Chase* (1863), 52 Me. 304, 83 Am. Dec. 514; *Butler v. St. Louis Life Ins. Co.* (1876), 45 Iowa 93; *Bomgardner v. Andrews* (1881), 55 Iowa 638, 8 N. W. 481; *Hurst v. Chicago, etc., R. Co.* (1878), 49 Iowa 76; *Muldowney v. Illinois Cent. R. Co.* (1874), 39 Iowa 615; *State v. Stickley* (1875), 41 Iowa 232.

In the seventh instruction, the court, in submitting interrogatories to be answered and returned with the general verdict, used this language: "The defendant re-

13. quests the following interrogatories," and then follow the interrogatories requested. Appellant claims that the interrogatories are presumed to come from the court, and the use of the expression "the defendant requests" was prejudicial to appellant. We think the expression used is open to criticism, but do not see in it any ground for reversal.

- The second instruction requested by the defendant
14. and refused is substantially covered by the tenth instruction, given at its request.

The sixty-sixth reason for a new trial is that the court failed to instruct as to the material allegations of the complaint. This question we have passed upon in considering the alleged errors in giving said instructions.

The sixty-seventh reason for a new trial is that the court's instructions as to contributory negligence and the burden of proof establishing contributory negligence are con-

15. fusing, contradictory and misleading. These are general statements which present no question. *Pittsburgh, etc., R. Co. v. Lightheiser, supra.* In connection with the last point, we deem it proper to say that the jury was instructed that before the plaintiff could recover she must prove by the preponderance of the evidence all the material allegations contained in her complaint; that she was required by a preponderance of all the evidence to establish the negligence of the defendant, and if she failed to do this she could not recover in this action; that she must prove that the jerk of the car was due to the negligent and unskillful acts of defendant's servants, and if she did not make this proof the jury should find for the defendant; that if the plaintiff proved by a preponderance of the evidence that the car on which she was riding was negligently started suddenly and with great force and violence, with a backward and forward movement, and that she was thrown and injured thereby without any fault on her part, if she had proved all the other allegations of her complaint by the preponderance of the evidence, the verdict should be for the plaintiff; that the plaintiff could not recover in this action unless she proved by a preponderance of the evidence that the injuries of which she complained were caused by the negligence of the defendant, as set out in her complaint, and that her attempt to alight was made in a careful and pru-

dent manner; that she must prove by a preponderance of the evidence that she used due care and diligence in her attempt to alight from the car; that if the defendant proved by the preponderance of the evidence that the plaintiff was guilty of some act or acts of negligence that contributed to her injuries, or that she did not use such care or caution as a reasonably prudent person would have used under the circumstances, then the defendant can defeat her recovery on the ground of contributory negligence; that if it was found from the evidence in this case that the plaintiff was guilty of the slightest degree of negligence in attempting to leave the car, and that such negligence materially contributed to her injury, that the jury must find for the defendant; that if it was found from the evidence that plaintiff was in a safe place on the car, and voluntarily attempted to leave the car when the same was in motion and was likely to cause her to be thrown to the floor, and that she was under no compulsion or restraint to do so, and if it was further found that a person of ordinary prudence, in the situation and condition of the plaintiff, would not have attempted to leave the car at the time and under the circumstances, and that it was dangerous to do so—then the plaintiff could not recover, because, under such facts, if they were found to exist in this case, the plaintiff would be guilty of contributory negligence. From these instructions we think the jury was fairly informed as to the facts necessary to constitute appellant's negligence as well as appellee's contributory negligence, and that, taking the instructions together, the jury was not misled.

Judgment affirmed.

PAHDE v. PATE ET AL.

[No. 6,688. Filed October 6, 1909. Rehearing denied January 5, 1910.]

APPEAL.—Weighing Evidence.—Fraudulent Conveyances.—Insolvency.—The Appellate Court will not weigh conflicting evidence as to whether a defendant was solvent at the time of his alleged fraudulent conveyance of his property.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Suit by John H. Pahde against Emma F. Pate and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

William L. Slinkard, for appellant.

Hastings, Allen & Hastings and *C. E. Henderson*, for appellees.

ROBY, P. J.—The appellant, who avers himself to be a judgment creditor of appellee James O. Pate, seeks in this suit to have certain conveyances made by said appellee to his coappellee and wife, Emma F. Pate, set aside as fraudulent. The complaint is in two paragraphs, in one of which it is averred that the grantee had full knowledge of the fraudulent purpose thereof, and in the other that she gave no consideration. The defendant answered by a denial. The issue was found against the plaintiff, a general finding made for defendants, and judgment rendered accordingly. Plaintiff moved for a new trial, and stated as grounds therefor that the finding of the court is contrary to law and not sustained by sufficient evidence.

Appellant states his contention in this court as follows: "The question to be determined is whether there is any evidence to sustain the finding of the court. In this connection we maintain that there is no evidence to sustain the finding of the court." An essential averment of the complaint was that defendants did not have sufficient other property

subject to execution out of which the plaintiff's claim could be made. The conveyances in question were made in 1899. In March, 1901, Pate became a voluntary bankrupt, his estate paying thirteen per cent. There is evidence which would perhaps have justified a finding of insolvency at the date of the conveyance, but there is also evidence which indicates the possession of considerable property by Pate. It would be a matter of some difficulty to determine the fact, as an original proposition, from the record, but coming to us with all legitimate inferences in the defendants' favor added, and all conflicts in evidence resolved against the plaintiff, we cannot say that insolvency was proved, as required to make out the plaintiff's case. The record illustrates the wisdom of the rule which leaves the weighing of evidence and finding of facts to the trial court. The judge of that court, hearing the testimony and observing the witnesses, was more capable of finding the truth than any appellate court could become from a study of the transcript.

It is not necessary to review other phases of the case, and the judgment is affirmed.

O'MARA ET AL. v. MCCARTHY.

[No. 6,918. Filed January 6, 1910.]

QUIETING TITLE.—Complaint.—Exhibits.—Abstracts of Title.—An abstract of title furnished by the plaintiffs under the order of the court (§369 Burns 1908, §363 R. S. 1881), in a quiet title suit, does not constitute an exhibit, and forms no part of the complaint, such suit not being founded upon such abstract.

From Superior Court of Vigo County; *John E. Cox*, Judge.

Suit by Daniel T. O'Mara and others against William P. McCarthy. From a judgment for defendant, plaintiffs appeal. *Reversed.*

Edward D. Reardon and *John W. Gerdink*, for appellants.
G. W. Kleiser and *J. H. Kleiser*, for appellee.

ROBY, J.—Appellants' complaint consisted of five paragraphs. At least three of them—the first, third and fifth—contained the averments necessary to a suit to quiet title to certain lots. The defendant moved that the plaintiffs be required to furnish an abstract of title to the real estate described in the fifth paragraph of complaint. No ruling was made on this motion. The record is as follows: "Come the plaintiffs and voluntarily comply with the defendant's motion heretofore filed, requiring," etc., "which abstract is in the words and figures as follows," etc. The abstract copied covers nineteen pages of the record. A later entry is as follows: "Come the plaintiffs herein by attorneys aforesaid, and voluntarily produce abstract to first and third paragraphs of complaint, which abstract is the same one heretofore produced."

Thereafter the court sustained demurrers to each the first, third and fifth paragraphs of complaint, to which action exceptions were reserved and errors thereon are assigned.

The appellee seeks to sustain these rulings, upon the theory that the abstract became a part of each paragraph, and "being a copy of the operative and material parts of deeds of conveyance is a written instrument and controls allegations of the pleading when there is a variance."

The statute is as follows: "The court, on motion, may order a further bill of particulars, when the one filed is defective; and may, in all proper cases, upon motion, order a bill of particulars of the claim of either party, and abstracts of title to be furnished." §369 Burns 1908, §363 R. S. 1881. The authority conferred is to order abstracts of title to be furnished. This comes very far short of making such abstract a part of the pleading.

Exhibits are part of the pleading only when they are the foundation of the action. "When any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading. A set-off or a

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counterclaim is within the meaning of this section. Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record. The account, if the items are numerous, shall not be copied in the pleadings, nor be deemed to be part of the record, unless by order of the court. Any variance between any pleading and copy of a written instrument filed, as to matter of description or legal effect, may be amended at any time (as of course) before judgment, without causing a continuance." §368 Burns 1908, §362 R. S. 1881.

Instruments which are evidences of title are not the foundation of the suit, and cannot be made exhibits. *Shetterly v. Art* (1906), 37 Ind. App. 687; *Sedgwick v. Tucker* (1883), 90 Ind. 271.

It cannot be that the legislature intended by one section of the statute to make an informal index to deed records a part of the pleadings, and by the immediately preceding section prevent the deeds themselves from being made exhibits. The abstract enables the party in "a proper case" to obtain specific information as to the claim of his adversary, which the adversary is not required to plead. This leads to a reversal of the judgment.

Judgment reversed and cause remanded for further proceedings.

INDIANAPOLIS TRACTION AND TERMINAL COMPANY v. ULRICK.

[No. 6,962. Filed January 6, 1910.]

1. CARRIERS.—*Street Railroads.—Alighting.—Damages.—Instructions.*—An instruction that the plaintiff, a married woman, is entitled to recover for "loss of time, if any," and "the expense, if any, necessarily incurred on account thereof," is not harmful to the defendant street railroad company, where there was no evidence introduced either as to loss of time, or expense. p. 150.

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2. **CARRIERS.—Street Railroads.—Alighting.—Damages.—Married Women.—Instructions.**—An instruction, in an action for personal injuries by a married woman, that the plaintiff is entitled to recover for "loss of time, if any," and that the jury may consider "how far, if at all, the injury renders her less fit to pursue her calling and business," and her ability to earn wages before and after the alleged injury, while not free from criticism, when considered in connection with other instructions, is not prejudicial. p. 152.
3. **DAMAGES.—Excessive.**—An award of \$1,000, to a married woman, twenty-seven years old, thrown from a street-car and receiving injuries, which caused intense pain, depression, and impairment of hearing and sight, is not excessive. p. 152.

From Marion Circuit Court (15,370); *Henry Clay Allen*, Judge.

Action by Cora M. Ulrick against the Indianapolis Traction and Terminal Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

F. Winter and *W. H. Latta*, for appellant.

W. D. Headrick and *C. A. Tevebaugh*, for appellee.

COMSTOCK, J.—Appellee sued appellant for personal injuries alleged to have been sustained by her, a married woman, while a passenger upon one of appellant's cars, by the sudden starting of the car while she was in the act of alighting therefrom, after the same had been stopped for the purpose of allowing her to alight. The complaint is in one paragraph. The cause was put at issue by a general denial. A trial by jury resulted in a verdict in favor of appellee for \$1,000.

The action of the court in overruling appellant's motion for a new trial is the only error assigned.

The court gave to the jury ten instructions, of which the seventh is the only one attacked by appellant as erroneous.

It is in the following language: "If, under the in-

1. structions of the court and all the evidence in the cause, you find that the plaintiff is entitled to recover in this action, then it will be your duty to consider the

amount of damages which the plaintiff has sustained, if any, by reason of the alleged negligent acts of the defendant. In estimating the same, you may take into consideration the nature and extent of the physical injuries, the physical pain endured and the mental suffering, if any, occasioned thereby, the loss of time, if any, and its value, if proved, occasioned by such negligent acts; and whatever pain and suffering and loss of time, if any, which the evidence shows is reasonably probable the plaintiff will sustain in the future by reason of the alleged wrongful acts of the defendant, and how far, if at all, the injury renders her less fit to pursue her calling and business, and the expense, if any, necessarily incurred on account thereof. You may consider the age of the plaintiff and the reasonable probabilities of life, her ability to earn wages before the alleged injury, and to what extent, if any, her ability to earn money has been affected by the alleged injury. The measure of such recovery should be limited to such compensation for damages as were the natural and direct consequences of the alleged negligent acts of the defendant, if any, as charged in the complaint, not to exceed the amount claimed."

It is urged against the instruction that it contains two allegations for which plaintiff is not entitled to recover. (1) Loss of time in past and in future. This is not confined to loss of time in performance of duties incident only to plaintiff's separate business. It includes loss of time in and about the duties of the household, time belonging to the husband and household, and for which a married woman is not entitled to recover. (2) Expense necessarily incurred on account of the injury. The evidence shows continued attendance of physicians and the use of medicine. As a married woman, plaintiff was not entitled to recover such expense of medical attendance, that right being in her husband. As to the first objection there is no evidence in the record showing any value of plaintiff's services to her husband as housekeeper. It appears from the evidence that the

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housework, cooking and washing were done by relatives of appellee as a matter of kindness. There is no evidence of any value of any medical services rendered. The question of expense was not before the jury, and there was no evidence upon which to calculate expense. There are no allegations in appellee's complaint of expense incurred because of said injury, either for medical treatment or assistance in doing the housework. It will not be presumed that the jury passed upon an item upon which there was no evidence. An instruction covering a question upon which there is no evidence is harmless. *City of Indianapolis v. Cauley* (1905), 164 Ind. 304.

It is further urged against said instruction that it is doubly erroneous, for the reason that it assumed as proved that plaintiff was engaged in a separate business on

2. her own account, and entitled to the proceeds thereof, and instructs the jury that she was entitled to said proceeds as a matter of law. It is claimed that this is an invasion of the province of the jury, which had the right to determine for itself what the evidence showed. The only ground upon which a reversal is asked is the giving of this instruction. The instruction is not free from criticism, but, considered in connection with the other instructions given and with the evidence, we conclude that it did not mislead the jury and did not prejudice the rights of appellant.

Appellee—a woman and a mother twenty-seven years of age—by the negligence of appellant, was made to suffer from

nervousness and intense pain, was depressed with
3. melancholy and fear of insanity and her hearing and sight were at times impaired. It would appear that the amount awarded her was not excessive for bodily injuries alone which she suffered, without reference to any expense, medical or otherwise, that she might have sustained.

Judgment affirmed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. HARVEY.

[No. 6,645. Filed January 7, 1910.]

1. **CARRIERS.—Railroads.—Stations.—Failure to Light.—Complaint.**
—A complaint alleging that defendant railroad company negligently failed to light the platform in front of its station, by reason whereof the plaintiff in attempting to reach the train stumbled against the raised end of such platform, to her injury, states a cause of action. p. 154.
2. **TRIAL.—General Verdict.—Interrogatories.**—A general verdict for the plaintiff is a finding in plaintiff's favor upon all of the issues, and answers to the interrogatories to the jury control the general verdict only when in irreconcilable conflict therewith. p. 155.
3. **TRIAL.—Verdict.—Interrogatories.—Conflict.—How Determined.**
—In determining whether there is a conflict between the general verdict and answers to the interrogatories to the jury, only the pleadings, general verdict and such answers will be considered. p. 156.
4. **CARRIERS.—Railroads.—Lighting Platform.—Verdict.—Interrogatories.—Conflict.**—Where the complaint alleged that the raised end of defendant railroad company's platform was "wholly unlighted and in total darkness," answers to interrogatories that the depot was lighted with four lamps which "threw a profuse light out the windows," are not in irreconcilable conflict with a general verdict for the plaintiff. p. 156.
5. **CARRIERS.—Railroads.—Lighting Stations.—Question for Jury.**—A railroad company which sells round-trip tickets to a small flag station is required to know that there will probably be passengers there, and is, therefore, required to light its platform for a reasonable time before the arrival of its train, the reasonableness of such time being a question for the jury. p. 156.
6. **APPEAL.—Absence of Evidence.—Instructions.—Presumptions.**—In the absence of the evidence, the presumption, on appeal, is that instructions refused were not applicable thereto. p. 157.

From Wayne Circuit Court; *Henry C. Fox*, Judge.

Action by Sarah M. Harvey against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Forkner & Forkner, for appellant.

Clay C. Hunt, Jackson & Hunter and Robbins, Starr & Robbins, for appellee.

WATSON, J.—This action was brought by the appellee to recover damages for personal injuries alleged to have been received by her in falling upon the depot platform of the appellant at Mooreland, Indiana. The cause was tried upon the second paragraph of the complaint. The appel-

1. lant, in its brief, says of the complaint: "The complaint, after stating the essential, prefatory facts, avers the alleged negligence of the defendant in the following terms: 'The plaintiff says the night was dark, and that said defendant had carelessly and negligently failed to provide, or cause to be provided, any artificial light of any kind to illuminate said grounds or way or said platform, and the raised end of said platform and said ground and said way were wholly unlighted and in total darkness, and that by reason thereof she was unable to see them and wholly unable to see the obstruction formed by said end of said platform raised as aforesaid, and she says she passed slowly and carefully over said ground and way, and while so walking along and over the same she came in contact with said raised end of said platform, and was thereby caused to trip, stumble and fall with great force and violence upon and against said platform, whereby and by reason whereof she avers that she then and there sustained and received a great, serious, severe and permanent wound and injury to her leg and knee.' "

The complaint also alleges that appellee resided in New Castle; that, on the day she received the injury, she and a party of friends went to the town of Mooreland over defendant's line of railway, for the purpose of attending church services; that she did attend church in Mooreland on the evening of the accident, and after the services were over she and her party of friends went to the defendant's

depot for the purpose of returning to New Castle; that she was unfamiliar with the depot, its approaches and surroundings; that on the night of January 16, 1906, there was a regular passenger-train of the defendant's line scheduled to leave the depot of defendant at Mooreland at 10:26 o'clock p. m., and that said train did leave at said time on said night; that she had in the afternoon of said day purchased a round-trip ticket from New Castle to Mooreland, which entitled her to ride as a passenger on said train. No demurrer was addressed to this paragraph of complaint, nor was there any assignment of error challenging its sufficiency. The complaint contains sufficient averments to state a cause of action as required under the statutes.

The appellant has assigned three errors, upon which it says this judgment should be reversed, but its brief contains the following: "Upon the record, we present but two questions. (1) Did the court err in overruling the motion for judgment upon the answers to the interrogatories, notwithstanding the general verdict? (2) Did the court err in refusing to give the instructions before set forth?"

The jury returned a general verdict for \$650 in favor of the appellee. By this general verdict every material fact legitimately provable under the issues is found in

2. support of the verdict in favor of the appellee. The answers to the interrogatories will only overthrow the general verdict when they are so antagonistic to each other that both cannot stand. *Keeley Brewing Co. v. Parnin* (1895), 13 Ind. App. 588; *Union Traction Co. v. Barnett* (1903), 31 Ind. App. 467; *Ohio, etc., R. Co. v. Trowbridge* (1890), 126 Ind. 391; *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 663; *Citizens St. R. Co. v. Batley* (1902), 159 Ind. 368; *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335, 5 L. R. A. (N. S.) 425.

In determining whether the general verdict shall be overthrown by the answers to the interrogatories, we consider

only the pleadings, general verdict and such answers.

3. It is alleged that "the raised end of said platform and said ground and said way were wholly unlighted and in total darkness." The general verdict determined this, as well as every other question essential to appellee's right

4. to recover, in her favor. The jury returned with the general verdict eighty-eight interrogatories with answers thereto. They stated the platform to be 144 feet long and 12 feet wide; that the depot was lighted by four lamps, which "threw a profuse light out the windows," but this does not find that the platform was lighted. Moreover, it is charged, and so found by the general verdict, that at the point where the accident occurred the platform was "wholly unlighted and in total darkness." No such antagonism exists between the answers to the interrogatories and the general verdict as to warrant the overthrow of the latter.

The jury found by interrogatory sixty-two that, prior to the accident, the defendant operated a through train scheduled to pass the town of Mooreland at 10:26 o'clock p.

5. m. They also found, by interrogatory sixty-three, that this train was stopped at Mooreland on flag only.

It is contended by the appellant that, inasmuch as this train was stopped upon flag only, it was not required to provide lights in the depot and on the platform. The jury found that the appellee purchased a round-trip ticket between New Castle and Mooreland; that at the time of the accident the depot was lighted with four lamps, but on ordinary occasions the appellant closed its depot at said station at Mooreland after the local train passed, about 8 o'clock p. m., so that the appellant must have known there would be passengers for this train. It was therefore its duty to have the platform lighted, as well as the depot, for a reasonable time before the arrival of the train. What constitutes a reasonable time, during which the premises should be lighted, is determined by the circumstances of each particular case. It was said in

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the case of *Abbot v. Oregon R., etc., Co.* (1905), 46 Ore. 549, 80 Pac. 1012, 1 L. R. A. (N. S.) 851, 114 Am. St. 885: "Whether or not such period of time next prior to the arrival of a train is reasonable during which the Oregon Railroad & Navigation Company should have kept its depot platform lighted at a station where its night passenger-trains were not scheduled to stop, is not now necessary to inquire, for that was a question exclusively for the jury to determine."

The law imposes a duty on a railroad company, engaged in carrying passengers for hire, to exercise reasonable care in keeping its platforms, approaches thereto, and station grounds properly lighted at nighttime for the safety of its passengers going upon them for the purpose of taking passage on its trains, or for the safety of passengers who alight from trains, for a reasonable time prior to the arrival and following the departure of trains stopping to take on or discharge passengers. 3 Thompson, Negligence (2d ed.), §2691; 4 Elliott, Railroads (2d ed.), §1641; *Louisville, etc., R. Co. v. Lucas* (1889), 119 Ind. 583, 6 L. R. A. 193; *Ohio, etc., R. Co. v. Stansberry* (1892), 132 Ind. 533; *Louisville, etc., R. Co. v. Treadway* (1896), 143 Ind. 689; *Draper v. Evansville, etc., R. Co.* (1905), 165 Ind. 117; *Abbot v. Oregon R., etc., Co., supra*.

The second error relied upon by appellant for the reversal of this cause is the refusal of the court to give instructions two and one-half and four, tendered by appellant.

6. The appellant did not bring the evidence up in this appeal, and unless it is in the record on appeal it will be presumed that the instructions refused were properly refused, the presumption being that they were not applicable to the cause made out by the evidence. *Patchell v. Jaqua* (1893), 6 Ind. App. 70; *Fifth Ave. Sav. Bank v. Cooper* (1898), 19 Ind. App. 13; *Holland v. State* (1892), 131 Ind.

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568; *Jenkins v. Wilson* (1895), 140 Ind. 544; *Pittsburgh, etc., R. Co. v. Collins* (1907), 168 Ind. 467.

We find no reversible error. The judgment is, therefore, affirmed.

CITIZENS STATE BANK v. READ ET AL.

[No. 6,896. Filed January 11, 1910.]

1. JUDGMENT.—*Foreign.—Jurisdiction.—Collateral Attack.*—A foreign judgment may always be questioned for a want of jurisdiction, and a sister-state judgment is foreign within this rule. p. 159.
2. JUDGMENT.—*Foreign.—Complaint upon.*—A complaint upon a foreign judgment, specifically setting out the manner of obtaining jurisdiction, must affirmatively show such jurisdiction, or relief will be denied. p. 160.
3. COURTS.—*Clerks.—Duties as to Records.*—The clerk of a court is a public officer who records the proceedings of the court and has custody of its records. p. 160.
4. JUDGMENT.—*Foreign.—Rendition by Clerk.—Complaint.*—A complaint upon a foreign judgment alleging that such judgment was rendered by a court of general jurisdiction is not sustained where the record shows that said judgment was rendered by the clerk of said court. p. 160.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by the Citizens State Bank, of Watseka, Illinois, against Reuben Read and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Willoughby & House and *James H. Carey*, for appellant.
C. B. Kessinger and *Cullop & Shaw*, for appellees.

ROBY, J.—This is an action brought by appellant against appellees. It is averred in the complaint that appellant recovered a judgment against the defendants in the circuit court of Iroquois county, Illinois, a court of general jurisdiction, for \$749 and \$4 costs, upon a certain promissory note. The case was put at issue by a general denial and an affirmative answer, denying jurisdiction in the Illinois court to render the judgment sued on. The case was tried without a

jury, a general finding made, and judgment rendered for the defendants. The determination of the appeal depends upon the sufficiency of the evidence to sustain the decision of the court. The judgment sued upon purports to have been rendered in vacation by the clerk of the circuit court of Iroquois county, in pursuance of an appearance for appellees by an attorney who waived the issuing and service of process, admitted the truth of the declaration, and consented that judgment be rendered. The authority of said attorney rests upon the following instrument:

“\$735. Mt. Carmel, Illinois, November 3, 1904.

On or before August 1, 1906, after date, for value received, we jointly and severally promise to pay to Oltmans Brothers, of Watseka, Illinois, or order, \$735, payable at the Citizens Bank of Watseka, Illinois, with six per cent interest per annum, payable annually, from date until paid. To secure the payment of said amount we hereby authorize irrevocably any attorney of any court of record to appear for us in such court in term-time or vacation, at any time hereafter, and confess judgment without process, in favor of the holder of this note, for such amount as may be unpaid thereon, together with costs and \$10 attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution on such judgment, hereby ratifying and confirming all said attorney may do by virtue thereof.”

It is recited in the judgment “that by virtue thereof,
* * * and in pursuance of the statute in such cases made and provided, it is thereupon considered,” but no statute of Illinois has been pleaded or proved. The appellees were and are all residents of Indiana, and were at no time within the jurisdiction of the Illinois court.

The jurisdiction of a foreign court is always open to inquiry and a court of a sister state is in this respect
1. regarded as foreign. *Old Wayne Mut. Life Assn. v. Flynn* (1903), 31 Ind. App. 473.

The record shows specifically the manner in which juris-

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diction was attempted to be acquired, and the inquiry is limited to the sufficiency of such showing. *Coan v.*

2. *Clow* (1882), 83 Ind. 417; *Jones v. Porter* (1864), 23 Ind. 66; *Doren v. Lupton* (1900), 154 Ind. 396.

The appellant must thereby establish jurisdiction of the Illinois court over the appellees. *Grover & Baker, etc., Mach. Co. v. Radcliffe* (1887), 66 Md. 511, 8 Atl. 265.

The clerk of a court is an officer who records the proceedings of the court and has custody of its records. *Ross v.*

Heathcock (1883), 57 Wis. 89, 15 N. W. 9; *Peterson*

3. *v. State* (1878), 45 Wis. 535; *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.* (1894), 52 N. J. Eq. 366, 28 Atl. 673. A record which shows

4. judgment rendered by the clerk of a court does not sustain the allegation of a judgment rendered by a court of general jurisdiction. *Grover & Baker, etc., Mach. Co. v. Radcliffe, supra*; *Pond v. Simons* (1897), 17 Ind. App. 84. Such a record cannot be made the basis of an action in this State. *Grover & Baker, etc., Mach. Co. v. Radcliffe* (1890), 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; *Grover & Baker, etc., Mach. Co. v. Radcliffe* (1887), 66 Md. 511, 8 Atl. 265; *Owens v. Henry* (1896), 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837.

The judgment is affirmed.

SMAIL ET AL. v. INDIANAPOLIS MORTAR AND FUEL COMPANY ET AL.

[No. 6,943. Filed January 12, 1910.]

1. **MECHANICS' LIENS. — Priorities. — Cross-Complaint. — Issues. — Special Findings.**—Where a complaint is filed for the foreclosure of a mechanic's lien, and the defendants severally file cross-complaints making the plaintiff and their respective codefendants defendants thereto, each alleging that the liens of the others are subordinate to his, a special finding that a named defendant, in writing, waived his priority in order that the owner might se-

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cure a loan from the defendant building and loan association, is within the issues. p. 161.

2. *APPEAL.—Affirmance.—Right Results.*—A judgment, clearly right, will not be reversed. p. 162.

3. *APPEAL.—Briefs.—Presentation of Questions.—Change of Venue.*—Where the record shows that a motion for a change of venue was both sustained and overruled, and the party's brief does not conform to the rules in presenting the question discussed, the Court may disregard such question. p. 162.

From Superior Court of Marion County (73,071); *Bernard Korbly*, Special Judge.

Cross-complaints by the Indianapolis Mortar and Fuel Company and others against Marion Small and others. From the decrees entered, defendant Small and others appeal. *Affirmed.*

W. W. Caffrey, for appellants.

C. E. Fenstermacher, for appellees.

ROBY, J.—This suit is for the foreclosure of a mechanic's lien. The Indianapolis Mortar and Fuel Company, the Dalton Lumber Company and Joshua M. Moore filed cross-complaints, in which they each claimed and sought to foreclose a mechanic's lien upon the real-estate described in the complaint, and the Parnell Building and Loan Association filed its cross-complaint for the foreclosure of a mortgage held by it thereon.

Each of these parties averred that the liens of the others were junior and subordinate. Issues were formed, and upon request the court made a special finding of facts and stated conclusions of law thereon, fixing the priority of the various liens to which it found the parties entitled.

The court found, in addition to facts upon which the liens claimed by the various parties depend, that Joshua M.

Moore, in order to induce the building and loan association to make a loan to the owner of the lot and building thereon, executed a written waiver of his right to a lien. It is claimed that this finding is without the

issue, and must be disregarded, and that therefore the conclusion of law subordinating the claim of said Moore was unwarranted. There are two reasons why this position is untenable: (1) The finding is not outside the issue, but was pertinent to the priority claimed by the several parties in their respective cross-complaints, being indeed the finding of a fact essential to the correct determination of that issue; (2) the result reached is absolutely correct, and when that is the case there can be no reversal. §700 Burns 1908, §658 R. S. 1881.

Appellant Smail, who was the owner of the real estate upon which said liens were foreclosed, filed an affidavit for a change of venue. The record shows that such motion was both overruled and sustained. The appellants' brief does not conform to the rules of this court, and in the state of the record such failure furnishes a sufficient reason for refusing to consider the point made.

The judgment is affirmed.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY v. JOHNSON ET AL.

[No. 6,842. Filed January 13, 1910.]

1. MUNICIPAL CORPORATIONS.—*Streets.—Grading.—Occupancy by Railroads.*—Cities have the right to establish grades for the streets thereof, and the occupancy of a street by a railroad company does not lessen nor affect such power. p. 167.
2. MUNICIPAL CORPORATIONS.—*Grading Streets.—Damages.*—Except by statute, cities are not liable for damages caused by the proper grading of streets. p. 167.
3. MUNICIPAL CORPORATIONS.—*Grading Streets.—Delegation of Power.—Railroads.*—Cities cannot delegate their power to establish street grades to railroad companies. p. 167.
4. RAILROADS.—*Changing Grades.—Damages.—Streets.—Cities.*—A railroad company that changes its grade to conform to a city ordinance, in the absence of negligence, is not liable to a frontager for damages to his lot. p. 168.

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5. RAILROADS.—*Rights of Way.—Occupancy.—Presumptions.*—A railroad company that takes possession of a right of way of the full legal width will be conclusively presumed to have appropriated such land. p. 169.
6. RAILROADS.—*Occupancy of Streets.—Presumptions.—Easements.*—A railroad company which has occupied a certain portion of a street for more than twenty years obtains title to such portion, but its use is subservient to the use thereof as a street, and the city may require such company to straighten its track therein. p. 169.
7. MUNICIPAL CORPORATIONS.—*Streets.—Easements.—Railroads.*—Cities may grant to railroad companies the right to use the streets, but such grants do not prevent frontagers from recovering damages for the additional burdens imposed upon their lots. p. 170.
8. MUNICIPAL CORPORATIONS.—*Streets.—Highways.—Ownership of.*—The owner of a lot abutting on a highway owns to the middle of such highway. p. 170.
9. DAMAGES.—*Railroads.—Streets.—Frontagers.*—A railroad company that is compelled by a city to straighten its tracks in a street, requiring the track to be laid on the opposite side of the street from where it formerly lay, is liable in damages for the additional burden to the frontagers upon such side of the street. pp. 170, 171.
10. LIMITATION OF ACTIONS.—*Damages.—Railroads.*—Twenty years' use of a street by a railroad company bars a right of action by frontagers for damages. p. 171.
11. PLEADING.—*Complaint.—Verbal Niceties.*—Courts will not indulge in mere verbal quibbles in determining the substantial rights of parties. p. 172.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by Mary Johnson and others against the Chicago, Indianapolis and Louisville Railway Company. From a judgment for plaintiffs, defendant appeals. *Reversed.*

E. C. Field, H. R. Kurrie, Brooks & Brooks, for appellant.

Henry P. Pearson, M. F. Dunn, Robert N. Palmer and M. B. Hottel, for appellees.

ROBY, J.—Appellees were plaintiffs, and recovered judgment from which the appeal is taken. The circuit judge upon request made a special finding of facts and stated conclusions of law thereon. The appellant excepted to the conclusions, and unsuccessfully moved for a new trial. The

facts are conceded to be found in accordance with the evidence. They are to the effect that defendant is a duly organized corporation; that at the time the complaint was filed and for at least five years prior thereto, it had operated a steam railroad extending from Louisville, Kentucky, to Chicago, Illinois, and through the corporate limits of the city of Bedford, Lawrence county, Indiana, and along J street in said city; that said street is sixty feet wide, and its course is north and south; that the plaintiffs are the owners of a lot abutting on said street for a distance of 180 feet; that for many years prior to November, 1905, said railroad ran upon said street in front of said lot, which is on the east side thereof; that the track was wholly on the west of the center of said street, and did not touch "that portion of said real estate owned by plaintiffs in fee simple, to wit, the east half of said street;" that defendant never paid or offered to pay plaintiffs anything by way of damages or compensation for the occupancy or use of said street; that defendant, in November, 1905, without leave or license, payment or tender of damages to appellees, moved its track, ties, roadbed and rails thirteen feet east, whereby four feet of the same was placed on the east side of the center of said street, gradually bearing west, until at a distance of seventy-two feet it was again upon the west side thereof; that it lowered the grade two and one one-hundredths feet, said grade being reduced gradually toward the south to eight inches at the south end of plaintiffs' real estate; that plaintiffs had erected, long before, a large two-story frame residence on said real estate at a cost of \$2,800; that the surface of said lot was considerably higher than the street; that there was an embankment west of the east side of the street, making a rounded approach of earth from near the track to the street line; that said embankment was from seven to ten feet at its extreme height; that there was a comparatively level space on top of said embankment in the street in front of plaintiffs' property, used for street purposes, and occupied,

prior to the change of track aforesaid, by a substantial sidewalk of stone flagging, running the whole length of plaintiff's lot, 180 feet, which walk cost and was worth \$90; that for the protection of said bank, and to keep it from sliding, plaintiffs had planted shrubbery and blue grass thereon, which effected said purpose; that there was also a fence along the west side of said premises; that the lot was level and was covered with grass and flowers; that all of said improvements were made with reference to the conditions existing prior to the change of track aforesaid; that, by reason of the change of said track, the natural support of the ground adjacent to plaintiffs' lot was destroyed; that defendant excavated and took away the earth in said embankment, most of which belonged to plaintiffs, whereby the earth was caused to slip and wash away, injuring plaintiffs' buildings, more particularly the walks to said dwelling-house; that the sidewalk was washed away and destroyed; that the walls of said house were cracked and weakened, causing the plastering to fall off, cracking the flues, and increasing the vibration caused by the jar of the passing trains; that plaintiffs' lot was worth \$4,000 before the change of said track and street, and thereafter, because of the injury thereto, as set out, was worth \$1,800; that the defendant's railroad was constructed in 1855; that during all the time prior to the change aforesaid it has been on the west side of the center of said street, and has never encroached on any part of the lot east of the center thereof; that the defendant appropriated the land occupied by its new roadbed without permission, without payment or tender of payment therefor, and over plaintiffs' objection, and that it has abandoned the strip of land formerly used by it; that the embankment between plaintiffs' lot and the railroad track was necessarily cut down to permit the relocation of said track; that the defendant built a concrete wall in front of plaintiffs' lot, from four to six feet high, two feet wide at the top and four to six feet wide at the base, at a cost of \$1,164.95, which was all

built on the east side of J street on plaintiffs' land, without payment or compensation therefor; that it was erected for defendant's benefit, and to prevent the washing and slipping and sliding of said embankment down upon its roadbed; that since the construction of said wall said embankment has ceased to slip; that there was no public improvement of said street in front of plaintiffs' lot ordered by said city. It is further found that an ordinance of said city, passed February 21, 1905, established a grade for J street, including that part of the street west of plaintiff's lot; that the ordinance provided that the defendant should immediately proceed with the lowering of its track over that part of said street to conform to such grade; that the defendant was by said ordinance ordered and required to reduce the grade of its tracks until it conformed to said grade; that the city desired to improve J street by the construction of a vitrified pavement from the north line of Seventeenth street; that between said points there were many curves in appellant's track; that, in order to make and maintain said improvement, it was necessary that the track be straightened and its grade lowered; that in order to have this done said city and said defendant, on June 21, 1905, entered into a contract, by the terms of which defendant agreed to straighten its tracks between said points, conform to said grade, remove a switch-track which it had between Fourteenth and Fifteenth streets, and to construct a part of said improvement, making the change of track and grade at its own expense; that as a consideration for this change in the alignment of its tracks it was relieved from any assessment on account of said improvement; that on September 6, 1905, said city, by ordinance, gave to defendant permission, authority, power and right to move its roadbed and track on J street, as heretofore described; that the contract for said improvement was let and the work completed and accepted, and the defendant performed its contract as aforesaid; that the change of grade and the change of location of the track

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were necessary to the making of said improvement by the city.

The regulation of the grade of its streets by a city is an exercise of police power, and such power is vested in the municipality by legislative enactment, either express

1. or necessarily implied. Express authority in that behalf is conferred upon cities in this State. §8696 Burns 1908, subd. 5, Acts 1905, p. 219, §93, §3542 Burns 1901, Acts 1891, p. 368. The circumstance that a railway occupies a part of a street, the grade of which the municipality desires to establish or change, does not take away the power possessed by it to regulate such grade. *State, ex rel., v. Indianapolis Union R. Co.* (1903), 160 Ind. 45, 60 L. R. A. 831.

Appellant did that which the city had a right to require, and its relation to the lot owners will have to be determined in view of that fact. "Where a street is graded pur-

2. suant to legal authority and in a careful manner, the adjoining owners of lots have no right to compensation for consequential damages to their lots, unless expressly given by statute." *Snyder v. President, etc.* (1855), 6 Ind. 237, 241. See, also, *City of Valparaiso v. Adams* (1890), 123 Ind. 250; *Keehn v. McGillicuddy* (1896), 15 Ind. App. 580; *City of Jeffersonville v. Myers* (1891), 2 Ind. App. 532.

Appellant insists that in cutting down the natural surface of the street to an established grade it is no more liable for damages than the city itself would be. The fact that

3. the change was made without coercion on the part of the city does not militate against this position. It is the undoubted law that the city cannot delegate its authority to the railroad company. The council cannot authorize a railroad company to take or injure the property of a citizen. *Protzman v. Indianapolis, etc., R. Co.* (1856), 9 Ind. 467; *Egbert v. Lake Shore, etc., R. Co.* (1893), 6 Ind. App. 350, 68 Am. Dec. 650; *Indianapolis, etc., R. Co. v. State, ex rel.*

(1871), 37 Ind. 489. In the case of *Protzman v. Indianapolis, etc., R. Co., supra*, the railroad company elevated the grade of the street and put its track thereon. In the case of *Egbert v. Lake Shore, etc., R. Co., supra*, the railroad company, as a part of its general system of improving its road-bed, raised the grade along its right of way, making it necessary to fill in to make approaches for a street crossing, and interfering with the ingress to and the egress from the land of an adjoining owner. In the case of *Indianapolis, etc., R. Co. v. State, ex rel., supra*, the railway company was mandated to grade the streets referred to in the case of *Protzman v. Indianapolis, etc., R. Co., supra*, so as to enable the public to use them. The doctrine is of necessity limited in application to facts which show an attempt on the part of the company to do something for itself.

The reasoning applicable to the change of grades by a city does not therefore apply to a grant of power to a commercial railroad to change the grade and occupy the street

4. with its tracks, and wherever it fails to appear that the change of grade is made solely for the public accommodation the railroad making it must answer for the consequences. Where, however, as here, it is clearly shown that the grade was fixed by the city in order that it might pave and improve the street, and that the only interest of the railway was to adjust its tracks to meet the requirements of the municipality, the reason upon which it is held responsible for the consequences of making such grade does not apply. When the reason ceases, the rule ceases, and the partial occupancy of such street by appellant's tracks is no reason for placing the abutting owner in any different position from that which he would occupy were the street not used by the railway. It happens here that the actual work of grading was done by the railway company. It was, however, done in pursuance of a contract within the province of the parties to make. The responsibility of the company depends upon the purpose for which the work is done, not upon

who does it. Of course for lack of care or skill the contractor, whoever he is, must answer to those damaged thereby, but this possible liability is not claimed herein. It therefore seems to us that the appellant ought not to be held responsible for damages caused by the act of the city in fixing a grade and conforming the street thereto for its own convenience.

The second phase of the case arises from the location of appellant's tracks on appellees' land. It contends that a

railroad company is presumed to appropriate a right

5. of way to the full width that it may take by law, and that it therefore holds a way in J street as wide as the street itself, having of course the right to lay its tracks on any part thereof. The cases cited "decide, in effect, that where a railroad company enters upon land and takes possession of, and occupies a right of way of the full width authorized by law, or by its charter, no limitation upon its right to do so appearing, it will be conclusively presumed that it appropriated the land so accepted or taken possession of to the full width allowed by law." *Indianapolis, etc., R. Co. v. Reynolds* (1888), 116 Ind. 356, 360.

The finding shows an occupancy by appellant of so much of the street as was covered by its ties, and that it never occupied any part east of the center line. Holding

6. for more than twenty years raised the presumption of a grant. *Town of New Castle v. Lake Erie, etc., R. Co.* (1900), 155 Ind. 18. Such presumption is confined to the land actually held. *Indianapolis, etc., R. Co. v. Reynolds, supra; McFadden v. Ross* (1890), 126 Ind. 344. While the municipality does not have power to remove a railroad track which has remained on the street for more than twenty years, its authority over the street and the manner of its use is no more impaired by the fact that a railroad company has a right to use it than such authority is impaired by the fact that other persons and corporations have a right to use it. The findings show appellant's track

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to have been so laid as to interfere with the general use of said street by the public. It was therefore a proper exercise of authority to require it to be straightened and put on the center line. §8696 Burns 1908, subd. 5, Acts 1905, p. 219, §93, *City of Noblesville v. Lake Erie, etc., R. Co.* (1891), 130 Ind. 1, 5; *Louisville, etc., R. Co. v. Phillips* (1887), 112 Ind. 59, 2 Am. St. 155; Elliott, Roads and Sts. (2d ed.), §807.

The city has the power to grant permission to a railroad company to build its track upon a street, and such power is presumed, from long-continued use, to have been ex-

7. ercised. Such permission is simply a grant of the right to share with the general public the use of the easement. It does not impair or destroy the right of an abutting owner to recover damages for the additional burden imposed upon his land. *Haslett v. New Albany, etc., R. Co.* (1893), 7 Ind. App. 603, 608; *Tate v. Ohio, etc., R. Co.* (1856), 7 Ind. 479; *Town of Rensselaer v. Leopold* (1886), 106 Ind. 29; *Burkam v. Ohio, etc., R. Co.* (1890), 122 Ind. 344; *City of Indianapolis v. Kingsbury* (1885), 101 Ind. 200, 51 Am. Rep. 749. See monographic note to *Louisville, etc., R. Co. v. Lellyett* (1905), 1 L. R. A. (N. S.) 49.

The owner of a lot abutting on a highway owns to the center of the street. *Cox v. Louisville, etc., R. Co.* (1874), 48 Ind. 178, 188; *Western Union Tel. Co. v. Krueger*

8. (1905), 36 Ind. App. 348; *Haslett v. New Albany, etc., R. Co., supra*; *Terre Haute, etc., R. Co. v. Rodel* (1883), 89 Ind. 128, 46 Am. Rep. 164. He may maintain an action against the railroad company for damages caused by the construction of a railroad along the street and over that part of the land owned by him. *Terre Haute, etc., R. Co. v. Rodel, supra*; *Protzman v. Indianapolis, etc., R. Co., supra*.

The application of the foregoing legal propositions to the facts of the case under consideration determines the relative rights of the parties. The appellant is lawfully upon

9. the street and has express authority from the city to lay its tracks over appellees' land. The appellees, on

the other hand, are entitled to recover such damages as the construction of such railroad has caused them. When the amount of such damage has been ascertained and paid, neither of said parties can have reason for complaint. The one will have been compensated for that given and the other will have paid for what it has received. The principles by which compensation must be made are well settled and often declared. *Evansville, etc., R. Co. v. Charlton* (1892), 6 Ind. App. 56.

The finding shows that the appellant had maintained its track on the opposite side of said street for such a length of time as to bar a claim for damages which might otherwise have been made against it on account of such occupancy. *Sherlock v. Louisville, etc., R. Co.* (1888), 115 Ind. 22.

This fact in nowise affects appellees' right to compensation for real estate now taken. It has been held that where a city granted a license for the use of a specified portion of the street, and appropriation proceedings were thereafter had, the landowner had a right to enjoin the construction of tracks outside of the limit fixed by said license and appropriation. *Chicago, etc., R. Co. v. Eisert* (1891), 127 Ind. 156; *O'Brien v. Central Iron, etc., Co.* (1902), 158 Ind. 218, 57 L. R. A. 508, 92 Am. St. 305.

The appellant's right in J street was limited to that portion thereof occupied by it, and has nothing to do with its appropriation of the appellees' fee. This would be true where compensation had in fact been made for that part of the street occupied, but appellant has not made compensation. It has not paid for what it has had. It has simply become entitled to the benefit of the statute of limitations; a statute of repose, the assertion of which implies no merit on the part of those availing themselves thereof. *Webb v. Rhodes* (1902), 28 Ind. App. 393.

It has voluntarily relinquished the right to invoke such statute. It was bound to know that the city had authority

over said street, and it impliedly undertook, from the beginning, to do what it has done—abide by and conform to all reasonable requirements which the city might make. If in so doing it foregoes the right to avail itself of the statute, the courts will no more intervene to avert the consequences of such waiver than they would intervene to prevent an honest debtor from making a new agreement to pay his barred debt. There has been some discussion as to the theory of the complaint. The construction of the pleading indicates pretty clearly that the principles of law applicable to the facts stated had not crystalized in the mind of the author, but it equally indicates a desire to recover all damages caused by the permanent location of the railroad on the appellees' land.

The objection to the form of the allegation—that appellees own the fee in the land east of the center of the street—

rests upon a verbal quibble too nice for the purposes

11. of substantial justice. The special finding shows the assessment of damages proceeds upon a consideration of facts which are in part not relevant thereto.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent herewith.

SHELTON v. LUNDIN.

[No. 6,609. Filed January 13, 1910.]

1. **BROKERS.**—*Compensation.*—*Agency.*—*Sales.*—A broker who has property for sale or exchange, and who brings the owner of the property and the purchaser together, an exchange or sale being effected, is entitled to his commission. p. 176.
2. **BROKERS.**—*Contracts.*—*Change of.*—*Commission.*—Where an owner specified, to his broker, certain terms of sale for his property, his subsequent change thereof on making a sale to the purchaser procured by such broker, cannot deprive such broker of his commission. p. 176.
3. **CONTRACTS.**—*Breach.*—*Special Findings.*—*Evidentiary Facts.*—Where a contract for the exchange of properties provided that if

one of the parties was unable to name a purchaser for certain property conveyed, then the contract should be "void and of no effect," a special finding merely showing that the party to the exchange who was to find a purchaser for said property informed such other party that he could not find a purchaser for the land involved in the trade, will be disregarded as evidentiary, especially where it is further shown that three days later the same parties closed the contemplated trade. p. 177.

4. **BROKERS. — Discharge. — Contracts. — Rescission.** — Where the owner of property employed a broker to effect a sale of property, and the purchaser that he secured entered into a contract of purchase, reserving a right to rescind, and he so rescinded, such rescission did not discharge the broker, nor deprive him of his right to a commission, where such persons three days later effected a sale on substantially the same terms. p. 177.

From Pulaski Circuit Court; *John C. Nye*, Judge.

Action by Morris Shelton against Charles J. Lundin. From a judgment for defendant, plaintiff appeals. *Reversed.*

A. L. Courtright and *H. A. Steis*, for appellant.
Beeman & Foster, for appellees.

COMSTOCK, J.—Appellant, plaintiff below, sued appellee to recover the sum of \$100 for services rendered by him to appellee under an employment as a broker for the sale of certain personal property owned by appellee. Issues were formed and the cause was submitted to the court. Upon timely request, findings of facts were made and conclusions of law stated thereon, and judgment rendered in favor of appellee.

The only error assigned is that the court erred in its conclusions of law.

The following is a fair summary of the facts found: On October 17, 1905, defendant employed plaintiff in this cause to procure for him a purchaser for a stock of goods in the town of Knox, Starke county, Indiana, and in such sale and exchange he was to receive \$2,500 in cash, and for which services defendant agreed to pay plaintiff the sum of \$100. Pursuant to such employment plaintiff procured Sydney A.

Uncapher as a purchaser for the property, who, upon the same day, entered into a written contract with defendant for the purchase of said stock of goods, by the terms of which Uncapher agreed to sell and convey to said Lundin his equity in forty acres of land, at and for the price of \$400, one lot in Summitville, Indiana, for \$400, two lots in Chicago for \$500, and eighty acres of land in Marshall county, Indiana. All the deeds mentioned in this item to be general warranty deeds, except the Marshall county land, which was to be a quitclaim deed from A. J. Uncapher and wife. Said Lundin agreed, in consideration of covenants of first party, to sell and transfer to said Uncapher all of said stock of drygoods and groceries in a building in the town of Knox, said goods to be invoiced at cost. He agreed to deliver possession of said stock of goods upon the following condition: \$2,500 cash, to be paid at the time invoice of stock was begun. Said Lundin agreed further to lease to said first party his store-room, shelving and counters for \$25 per month for the period of one year, with privilege of renewing the lease for the further term of five years. The contract further states:

“It is understood and agreed by the parties that the eighty-acre tract named, known as the Rank farm, shall be sold to any purchaser named by the first party herein at \$40 per acre, being in gross \$3,200. Second party agrees to make to such purchaser his warranty deed for said eighty acres, and to give possession to such purchaser as early as may be. * * * If the first party is unable to name any purchaser according to the provisions of this item, then and in that event this contract shall be void and of no effect; otherwise to be in full force.”

There are other conditions not necessary to be set out.

After the execution of the foregoing written contract, dated November 7, 1905, said Uncapher informed the defendant that he could not find or procure a purchaser for said land, and that thereupon said defendant and said Uncapher, by mutual consent and understanding, annulled said written contract, releasing each other therefrom.

At the time of the making of the contract between said Uncapher and the defendant, which is known as the first contract, the plaintiff was present, and knew of the conditions and provisions of said contract, and knew that said Uncapher reserved the right to annul the contract if he could not find a purchaser for the eighty-acre tract of land for the sum before named.

On November 10, 1905, Uncapher, after negotiating with defendant, entered into another written contract with him for the purchase of defendant's stock of goods, and upon which written contract said stock of goods was finally purchased and procured of the defendant herein. By the terms of said second contract, Uncapher agreed to convey by deed of general warranty the forty acres of land described in the first contract, and by deed of quitclaim the eighty acres of land in Marshall county, Indiana, known as the Rank farm, and to pay to said Lundin at the time of signing the contract \$1,000 in cash. Said Lundin upon his part, in consideration of the covenants of the said Uncapher, set out, agreed to sell and transfer to Uncapher the stock of goods and groceries, being the same mentioned in the first contract, including all fixtures, except counters and shelving, and to deliver possession upon the terms and conditions as follows: A cash payment of \$1,000; conveyance by warranty deed by the first party to the second party of the forty-acre tract; conveyance by quitclaim deed of the eighty-acre tract known as the Rank farm in Marshall county, Indiana. Said Lundin agreed to lease his storeroom, shelving, etc., upon the same terms as provided in the first agreement. It was further agreed that upon the signing of the contract the first party should procure for second party the quitclaim deed before named, for the Rank farm, and allow and pay to Lundin all necessary expenses and attorney fees and court costs to obtain possession of the Rank farm, and that Uncapher would pay all taxes now due and payable upon the lands described in item one; that he would assume and pay any and

all other liens of whatever kind upon said lands, and that Lundin would pay all liens or claims on account of stock of goods whether for purchase money or otherwise. Plaintiff took no part in any of the negotiations between the parties for the sale or exchange of said property after said written contract was annulled, and did not know of the proposition made by said Uncapher for the purchase of the property, nor of the making of said contract on November 10, 1905, but learned of said proposition and contract sometime thereafter. At the time of plaintiff's employment, and when he first went to Uncapher to sell him the stock of goods belonging to defendant, there had been no negotiations between defendant and Uncapher, but there had been, about four weeks prior thereto, negotiations between the defendant and Uncapher for the sale of said stock of goods to said Uncapher. Prior to the commencement of this suit the plaintiff asked the defendant for the commission claimed to be due him from the defendant, and the defendant refused to pay the same. The court concluded as follows: "That the plaintiff take nothing by this action."

When a broker who has property for sale or exchange is instrumental in bringing the owner of the property and the purchaser together, and an exchange or sale is ef-

1. fected by the parties in interest, he is entitled to his commission. *McFarland v. Lillard* (1891), 2 Ind. App. 160, 163, 50 Am. Stat. 234; *Barnett v. Gluting* (1892), 3 Ind. App. 415, 417; *Platt v. Johr* (1894), 9 Ind. App. 58; *Clifford v. Meyer* (1893), 6 Ind. App. 633, 642; *Vinton v. Baldwin* (1882), 88 Ind. 104, 45 Am. Rep. 447; *Fischer v. Bell* (1883), 91 Ind. 243, 244; *Cox v. Haun* (1891), 127 Ind. 325; *Storer v. Markley* (1905), 164 Ind. 535.

A change made by the vendor or by the vendee, altering the terms of the original contract, cannot deprive a broker of his rights. *McFarland v. Lillard, supra*;

2. *Lawrence v. Atwood* (1878), 1 Ill. App. 217; *Bash v. Hill* (1871), 62 Ill. 216; *Adams v. Decker* (1889),

34 Ill. App. 17; *Plant v. Thompson* (1889), 42 Kan. 664, 22 Pac. 726, 16 Am. St. 512; *Stewart v. Mather* (1873), 32 Wis. 344; *Woods v. Stephens* (1870), 46 Mo. 555; *Keys v. Johnson* (1871), 68 Pa. St. 42.

The contract contains this provision:

“If the first party is unable to name any purchaser according to the provisions of this item, then and in that event this contract shall be void and of no effect.”

There is no finding that Uncapher was unable to name

3. any purchaser. The finding that “on November 7, 1905, said Uncapher informed the defendant that he could not find or procure a purchaser for said land” is the finding of an evidentiary and not an ultimate fact. The fact found is that on November 7, 1905, appellee and his vendor, by mutual consent, annulled the agreement, which negotiations could not affect the rights of the broker.

The date of making the second agreement—November 10, 1905—and the date of the first—November 7, 1905—together with the property involved and the terms of the contract, almost, if not quite, compel the inference that the second contract was entered into to avoid paying to the appellant his commission. There is no finding that

4. appellant was discharged from his employment. The rescission of the first contract was not a discharge of appellant. The basis of appellant’s right is that the sale, although under a modified agreement, was actually due to his work. The burden of showing that Uncapher was unable to name a purchaser was upon appellee.

Judgment reversed, with instructions to restate the conclusions of law and render judgment in favor of appellant.

BOLTZ v. O'CONNER.

[No. 6,638. Filed January 14, 1910.]

1. **VENDOR AND PURCHASER.—Lands.—Representations.—Presumptions.**—A vendor is presumed to know the truth of his representations as to the character of soil on his farm, and the value thereof. p. 180.
2. **VENDOR AND PURCHASER.—Representations.—Opinions.—Value.**—Representations as to the value of a farm are usually considered as merely expressions of opinion; but where the vendor knows that the purchaser is wholly ignorant of the value of the land, and the value is stated as a fact and relied upon, to the vendor's knowledge, the vendor is bound thereby. p. 181.
3. **VENDOR AND PURCHASER.—Representations as to Value.—Answer.—Counterclaim.**—Allegations in an answer and in a counterclaim that the vendor falsely represented that his farm was worth \$19,000, that the purchaser was not acquainted with the value thereof, that relying upon the representation he purchased said farm, and that such farm was not worth more than \$12,000, do not show that such representation was more than the expression of an opinion. p. 181.
4. **VENDOR AND PURCHASER.—Representations as to Soil.—Answer.—Counterclaim.**—Allegations in an answer and in a counterclaim that the vendor falsely represented the soil on his farm to be rich, very productive, deep and black, for the purpose of cheating the purchaser, that the purchaser was ignorant of the falsity thereof, and that the purchaser was injured thereby, sufficiently show false representations of facts, and constitute a good defense and counterclaim to an action for the purchase price. p. 181.
5. **VENDOR AND PURCHASER.—False Representations.—Fraud.**—Vendors who falsely represent, to a purchaser's injury, are ordinarily not permitted to take advantage thereof under the pretense that the purchaser should not have believed them. p. 183.
6. **VENDOR AND PURCHASER.—False Representations.—Fraud.**—A vendor's statements that the soil on his land is very productive, rich, deep, and black, are expressions of fact and not of opinion. pp. 183, 184.
7. **WORDS AND PHRASES.—"Rich" Soil.**—The word "rich," when applied to the soil, imports fertility, productiveness, and abundance of yield. p. 183.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by Thomas W. O'Conner against Henry W. Boltz. From a judgment for plaintiff, defendant appeals. *Reversed*.

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Alfred W. Reynolds, Addison K. Sills, George C. Reynolds and Charles R. Pollard, for appellant.

Truman F. Palmer, Benjamin F. Carr and Boyd & Julian, for appellee.

HADLEY, J.—Appellee sued appellant to recover \$2,000 on a check given by appellant to appellee, drawn upon the State Bank of Monon, and which check said bank had refused to pay on account of insufficient funds. Appellant answered the complaint in three paragraphs, the first being a general denial, the second, fraud in the procurement of the execution of the check, and the third was in the nature of a counterclaim, and demanded the cancellation of the check and a contract for the sale of lands executed contemporaneously therewith, upon the ground of fraud in the procurement of the execution of the same. Appellee demurred to the second and third paragraphs of answer, which demurrers were sustained. Appellant then dismissed the first paragraph of answer and refused to plead further, and judgment was rendered against him.

The question here presented is upon the rulings of the court on said demurrers. It is averred in the answer and counterclaim that appellee was the owner of certain lands in White county, Indiana; that Chester Sprague was his agent; that said Sprague, for the purpose of cheating and defrauding appellant, and to induce him to enter into a contract to purchase appellee's said real estate, did then and there falsely represent to appellant "that the soil of said real estate was very productive; that it was rich; that it was a deep, black soil; that it was the richest real estate in White county, Indiana, and was of the value of \$19,000; that at that time appellant lived about fifteen miles from said real estate; that he was not acquainted with said real estate; that he was not acquainted with the soil of said real estate nor with the soil of the real estate in that locality—whether productive or not, whether rich or poor soil—nor of

the value thereof; that he had been, for some time prior thereto, acquainted with the agent of appellee; that relying upon the statements made by said appellee and his said agent, and believing them to be true, he entered into a written contract with appellee, in which he agreed to purchase said real estate and pay therefor the sum of \$19,000; that said check sued on was in part payment of said contract price, and said representations were and are false and made for the fraudulent purpose of selling said real estate to appellant at an excessive price, and for the purpose of procuring appellant to enter into said contract; that said representations were false, in this, that the soil of said real estate was not very productive and it was not rich; that it was not a deep, black, rich soil; that said real estate was not the richest in White county, and was not of the value of \$19,000, nor of the value of more than \$12,000; that the soil of said real estate was and is poor; that it is sandy, and the sand and gravel lie near the surface of the ground, all of which appellee well knew at the time said representations were so made by him and his agent." Further facts were averred, showing that no possession of the land had been taken, or other property received or rights exercised, under the contract by appellant.

It will be observed that the representations which are averred to be false, are representations of matters of which the owner is presumed to know the truth, although

1. there is no averment of confidential relations existing between appellant and appellee or his agent. It is shown that appellant was acquainted with the agent of appellee. It is not averred that appellant was ignorant or in any way deficient in understanding or comprehension, and thereby rendered unequal to the task of protecting his interests against the representations of appellee or his agent. Neither is it averred that appellee knew that appellant was unacquainted with the land, its quality, character or value, or was unacquainted with the values of land or other prop-

erty generally; nor that appellee knew that appellant was relying upon him or his agent for information as to these matters; nor that appellee or his agent had any special knowledge or were experts as to the value of said real estate; but it is averred that the representations complained of were falsely and fraudulently uttered for the purpose of deceiving and cheating the appellant, and that the appellee knew that such representations were false when he made them, and that appellant was misled and injured by them.

As a rule, representations as to value are not held to be statements of fact, but are considered expressions of opinion.

Culley v. Jones (1905), 164 Ind. 168; *Bolds v. Woods*

2. (1894), 9 Ind. App. 657; *Shade v. Creviston* (1884), 93 Ind. 591; *Kennedy v. Richardson* (1880), 70 Ind. 524. This is not a hard and fast rule, however. In certain circumstances such representations may be made the grounds of an action, and are called affirmations of fact. *Culley v. Jones, supra*. The rule by which such expressions should be measured is laid down in the case of *Culley v. Jones, supra*, by the following from *Murray v. Tolman* (1896), 162 Ill. 417, 44 N. E. 748: "Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to the value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound."

The averments of the answer and counterclaim of the representations as to the value of the land cannot be said to present such circumstances as to make them excep-

3. tions to the general rule, and in this regard are insufficient as a defense or counterclaim. It is averred in both the answer and counterclaim that appellee rep-
4. resented the soil of said land to be rich, very productive, and a deep, black soil, all of which is averred to

be false and was known to be false, and that the truth in regard thereto was unknown to appellant. It must be conceded that the averments in this connection are indefinite and meager; but when taken with the averment that they were falsely made with knowledge and for the purpose of cheating appellant and obtaining an excessive price for the land, and were relied upon by appellant to his injury, if they were representations of a material fact, they were sufficient to present a defense or claim for rescission.

In the case of *Rauh v. Waterman* (1902), 29 Ind. App. 344, 350, the following rule, to be observed in such cases, is laid down: "The logical and just test is found in the standard of a reasonable man's action under the same conditions, modified, of course, by particular facts rendering the defrauded person unable to use such degree of care for his own protection."

In the case of *Jones v. Hathaway* (1881), 77 Ind. 14, appellants leased lands to appellees, which were fifteen miles away, and represented that said lands were not subject to overflow from an adjacent river. This was untrue and known to be untrue by appellants, but the falsity was unknown to appellee when made. The court in discussing this point uses this language: "The representations were as to matters of fact, on which the appellees had the right to rely; and their truth was negatived in clear and explicit terms. Certainly, the appellees were under no obligation to go upon the demised lands and examine or inquire into the truth or falsity of the appellants' representations. *Taylor v. Fletcher* [1860], 15 Ind. 80. Upon this point, in the case of *Mead v. Bunn* [1865], 32 N. Y. 275, the court said that it is a 'mistaken assumption, that a false representation by one of the parties to a contract puts the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no

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obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' ” To the same effect are the following cases: *Manley v. Felty* (1896), 146 Ind. 194; *Union Cent. Life Ins. Co. v. Huyck* (1892), 5 Ind. App. 474; *Kramer v. Williamson* (1893), 135 Ind. 655; *Frenzel v. Miller* (1871), 37 Ind. 1, 10 Am. Rep. 62; *Bloomer v. Gray* (1894), 10 Ind. App. 326.

Of course there are particular cases by which the foregoing rule may be varied or held not to apply; but it appears,

from the numerous cases we have examined, to be

5. applicable in cases like the present, where there is a direct charge of purposeful cheating. It appears to us to be an equitable rule. While every one should be diligent and alert in a trade, and should not be lured into a bad bargain by expressions of opinion, we can see no reason why he should not be protected in his confidence in his fellow-men and in his consequent belief in a direct statement of a fact. And we can see no reason in either equity or good conscience, why one who utters a known falsehood for the purpose of imposing upon the credulity of another, and thereby obtains an advantage to the other's injury, should be permitted to profit thereby. Surely he has no just ground of complaint if a court withholds from him the profits of such dealing and restores it to the one thus defrauded.

The next question for our consideration is whether representations that the soil was very productive, was deep, rich,

black soil, are representations of fact or merely ex-

6. pressions of opinion. The terms, rich soil, very productive, deep, black soil, when used in describing real estate, have certain definite meanings. “Rich” is de-

7. fined in this connection as fertile, fruitful, producing or yielding abundantly; as rich soil, etc., of great price or money value; abounding in desirable or effective qualities or elements; of superior quality, opposed to poor. Century Dict. Yielding large returns, productive or fertile,

fruitful, as rich soil or land. It is the opposite of poor. Webster's Dict.

It is hardly necessary to cite these definitions, as they are matters of common knowledge, understood by everyone; and, in our opinion, the representations that the soil is

6. rich, that it is fertile, that it is very productive, are statements of facts, unless qualified in some manner that would indicate that only an opinion or estimate was intended. It has been held in this State that such representations may be representations of facts. *Harris v. McMurray* (1864), 23 Ind. 9. The descriptive terms used were material, directly affecting the value of the land. *Harris v. McMurray, supra*; *Norris v. Tharp* (1878), 65 Ind. 47.

For the foregoing reasons, we hold that the second paragraph of answer and the counterclaim were sufficient to entitle appellant to the relief asked, and the demurrers thereto should have been overruled.

Judgment reversed, with instructions to overrule the demurrers to said paragraphs, and for further proceedings not inconsistent with this opinion.

BOARD OF COMMISSIONERS OF THE COUNTY OF JACKSON ET AL. v. ZOLLMAN.

[No. 6,949. Filed January 25, 1910.]

1. HIGHWAYS.—*Free Gravel Roads.—Acceptance of.—Protests by Taxpayers.—Time for Filing.*—Under §6911 Burns 1901, Acts 1901, p. 449, §13, providing that whenever the superintendent and the engineer of any free gravel road shall file verified statements of the completion of such road with the county auditor, which statements must be filed at least ten days before the first day of the regular term of the board of commissioners, any interested taxpayer may, "within said ten days," file his verified statement that such improvement is not completed, such taxpayer must file such statement within such ten days, or it may be stricken out on motion. p. 186.
2. HIGHWAYS.—*Free Gravel Roads.—Acceptance of.—Protests by Boards of Commissioners.*—Boards of commissioners have no right

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to protest, on behalf of taxpayers, against the acceptance of a free gravel road, the superintendent and the engineer having filed their verified statements that such road had been completed. p. 187.

From Jackson Circuit Court; *Joseph H. Shea*, Judge.

Petition by George W. Zollman against which the Board of Commissioners of the County of Jackson, and another, remonstrate. From a judgment for petitioner, remonstrants appeal. *Affirmed*.

S. A. Barnes, Kochenour & Price and *W. H. Endebrook*, for appellants.

Hottel, Cauble & Hottel and *Branaman & Branaman*, for appellee.

COMSTOCK, J.—On September 12, 1904, appellee entered into a contract with the Board of Commissioners of the County of Jackson for the construction of a free gravel road in Carr township, said county, under the act of 1901 (Acts 1901, p. 449, §§6899-6913 Burns 1901) and amendments of 1903 (Acts 1903, pp. 263, 288 and 294), authorizing boards of commissioners to contract for the construction of free gravel roads, etc.

On July 2, 1907, appellee filed a written petition asking the board of commissioners of said county to receive his said road as completed according to the plans, plats, profile and contract under which said improvement was let. This petition was based upon affidavits made by the superintendent and the engineer that said road has been completed by the contractor according to the plans, plats, profiles and contract under which such improvement was let, and that the quantity and quality of the material used in making said improvement was the kind of material, except better, and that the quantity used was as required in the contract.

To this petition, appellant Charles Wright filed a written protest, and such proceedings were had before said board that the petition of appellee was denied. From this ruling of the board appellee appealed to the circuit court, where the

matter was tried, resulting in a finding for the appellee, and, over the separate motions by appellants for a new trial, judgment was rendered as follows: "And it is now ordered, considered, adjudged and decreed by the court that, prior to June 20, 1907, a certain free gravel road in Carr township, Jackson county, State of Indiana, known as the Jackson Spur Road (Letter II), constructed by plaintiff, George W. Zollman, and defendant Board of Commissioners of the County of Jackson, under the provisions of an act of the General Assembly of the State of Indiana, approved March 11, 1901 (Acts 1901, p. 449, §§6899-6913 Burns 1901), was completed by the contractor [plaintiff George W. Zollman] in all things according with and in compliance to the terms of the plans, plats, profiles and contract under which said improvement was let by the Board of Commissioners of the County of Jackson, and that the quantity and quality of said material used in making said improvement was the kind of material and quantity required in the contract for such improvement; and it is further ordered, considered, adjudged and decreed by the court that the Jackson Spur Road (Letter H), in Carr township, Jackson county, Indiana, as improved and constructed by George W. Zollman, under contract with the Board of Commissioners of the County of Jackson, be and the same is hereby accepted and received as completed by plaintiff, George W. Zollman, in all things according to the plans, plats, profiles and contract under which said improvement was let," etc.

The board of commissioners assigns as error the action of the court in overruling its motion for a new trial. Appellant Wright assigns as error the overruling of his motion to file his protest herein and his motion for a new trial.

We shall consider these assignments in their inverse order. Section 6911, *supra*, provides that "whenever any superin-

- tendent and the engineer of any road or roads constructed under the provisions of this act * * * shall each file their sworn statements with the auditor

of the county, which sworn statements shall state that such road or roads, or part thereof, has been completed according to the plans, plats, profiles and contract, under which such improvement was let, and that the quantity and quality of material used in making said improvement was the kind of material, and that the quantity was used as required in the contract, the board of county commissioners shall not act on such proof of the completion of such road or roads or part thereof until said sworn statements have been filed with the auditor at least ten days before the first day of any regular term of said board, and if, within said ten days, any taxpayer interested in such improvement shall file his sworn statement with the auditor that such road or roads or part thereof has not been completed according to the plans, * * * under which such improvement was let, and states specifically in what particular the same has not been completed, then, in such case, the board of county commissioners shall set a day for hearing such issue and hear other proof on such matter," etc.

The record shows that the affidavit of the superintendent and the engineer was filed on June 20, 1907, more than ten days prior to the regular July term, 1907, of the board, and appellant Wright did not offer to file his protest until July 2, 1907, and after the ten days for the filing by the taxpayer, had expired. It was not error therefore to refuse permission to file said protest.

No legal objection having been made to said affidavit, the court committed no error in overruling his motion for a new trial.

As to the appellant board of commissioners, no taxpayer having made complaint within the time and in the manner specified by statute, neither Jackson county nor its representative, the board of commissioners, can be heard to complain for them. The motion for a new trial was properly overruled.

Judgment affirmed.

BROWN v. THOMPSON.

[No. 6,616. Filed January 25, 1910.]

1. LANDLORD AND TENANT.—*Justices of the Peace.—Complaints before.—Sufficiency.*—A complaint before a justice of the peace is sufficient if it apprises the defendant of the nature of the plaintiff's demand, and states facts sufficient to bar another action for the same cause. p. 189.
2. LANDLORD AND TENANT.—*Complaint before Justice of the Peace.*—A complaint before a justice of the peace, alleging that the plaintiff's lessor rented to the defendant, for two years, a certain room in her hotel, that defendant took and now holds possession thereof, that the rent was payable monthly in advance and defendant failed to pay same, that defendant unlawfully holds possession of such room, that the plaintiff leased such building including the room rented to defendant, to defendant's knowledge, and that plaintiff is damaged in the sum of fifty dollars, states a cause of action. p. 190.
3. LANDLORD AND TENANT.—*Unlawfully Holding over.—Gist of Action.*—In actions to recover possession of leased premises unlawfully held by tenants, the wrongful possession is the gist of the action. p. 191.
4. LANDLORD AND TENANT.—*Rent.—Failure to Pay.*—A tenant who agrees to pay in advance a stipulated sum, as rent, on the first day of each month, and who fails to pay same, holds over unlawfully, such failure having determined his tenancy. p. 191.
5. JUSTICES OF THE PEACE.—*Jurisdiction.—Landlord and Tenant.—Holding over.*—Justices of the peace have jurisdiction over actions to recover possession as against tenants unlawfully holding over p. 192.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Millard F. Thompson against Toney Brown. From a judgment for plaintiff, defendant appeals. *Affirmed.*

McCabe & McCabe, for appellant.

Charles R. Milford, for appellee.

MYERS, C. J.—Appellee commenced this action against appellant before a justice of the peace, to recover possession of a certain room of a certain building, and for damages. From

the judgment of the justice an appeal was taken to the circuit court. Trial by the court, with special finding of facts, and conclusions of law thereon, and judgment rendered in favor of appellee.

Error is assigned on the action of the circuit court in overruling appellant's demurrer for want of facts to the complaint, and that the court erred in its conclusions of law.

It appears from the complaint that on May 19, 1906, Margaret Smith was the owner of certain real estate in the city of Attica, on which was located a hotel known as the "Revere House;" that she rented the south corner room of said hotel building to the defendant for a period of two years, beginning July 1, 1906, and ending on July 1, 1908, for an agreed rental of \$30 per month, payable monthly in advance; that the defendant took possession of said room on July 1, 1906, "and has held possession of same ever since that date, and now is in possession thereof under said lease;" that defendant failed and neglected to pay the rent due for the months of March and April, 1907; "that the defendant unlawfully holds possession of said premises and retains the same from the plaintiff;" "that on February 9, 1907, said Smith leased to plaintiff [appellee] said 'Revere House,' which is a hotel building, including said south corner room leased to defendant by her, by a written lease; that under said lease the plaintiff took possession of said building, including the premises occupied by defendant, which defendant knew prior to March 1, 1907;" "that by defendant's unlawful detention plaintiff is damaged in the sum of \$50. Wherefore plaintiff demands judgment," etc.

Formality is not required in stating a cause of action before a justice of the peace. It is sufficient even as against a demurrer, "if the complaint contains sufficient sub-

1. stance to apprise the adverse party of the nature of the demand, and to bar another action for the same thing." *Clifford v. Meyer* (1893), 6 Ind. App. 633; *Croker*

v. *Hoffman* (1874), 48 Ind. 207; *Murphy v. Lambert* (1877), 59 Ind. 477; *Sherrod v. Shirley* (1877), 57 Ind. 13.

While the complaint is somewhat contradictory in its allegations in regard to the possession of the particular room in question, and does not come up to the standard of

2. good pleading in stating the duration of the tenancy of the appellee, yet, in view of the liberal construction to be given complaints in actions commenced before a justice of the peace, we are of the opinion that it is sufficient to inform the opposite party of the nature of complainant's demand, and, the grounds upon which a recovery is sought. The language, though somewhat awkwardly expressed, is nevertheless sufficient to warrant a judgment, which could be pleaded in bar of another action for the same demand.

In substance, the special findings show that in the year 1906 the owner of a certain building known as the "Revere House," in Attica, Indiana, of which building the room in question was a part, in writing leased said room to the appellant from July 1, 1906, to July 1, 1908, at a monthly rental of \$30, payable in advance on the first day of each month. On July 1, 1906, appellant took possession of the room under said lease, and continuously thereafter and at the time of the trial was in possession thereof. On February 9, 1907, said owner of said building, in writing, leased to appellee the entire building, including the room leased to appellant, and on February 11, 1907, appellee took possession of said building, by virtue of the lease to him, subject to the rights of appellant, and ever since that time has been, and at the time of the trial was in possession thereof; that prior to March 1, 1907, appellant knew of the lease to appellee and acquiesced therein, and on February 26, 1907, he paid to appellee \$20, the proportionate share of the rent for said room for the month of February, 1907. On March 1, 1907, appellant tendered to appellee the rent for said room due on that day. On April 1, 1907, appellant neither tendered nor paid to appellee the rent then due, but did on April 6 tender to

appellee the sum of \$60, the full amount of rent due for the months of March and April, which appellee refused to accept. On said April 1, appellee demanded of appellant possession of the room in question, and on said April 6 commenced suit before a justice of the peace for possession thereof and damages. On May 1, 1907, appellant tendered to appellee \$90 as rent for the months of March, April and May. Upon the foregoing facts the court stated as a conclusion of law "that plaintiff is entitled to the possession of the real estate and premises sued for herein, that defendant unlawfully holds over and detains same from plaintiff, to plaintiff's damage in the sum of \$90."

This appeal was taken from a judgment rendered June 1, 1907.

From the special findings it will be seen that this proceeding was possessory in its nature, and the wrongful possession of the premises in question was the gist of the action.

3. The appellant took possession of the room under an express contract with the owner, whereby he agreed to pay a monthly rental of \$30, payable on the first day of the month, in advance. Thereafter said owner, in writing, demised the entire premises, including the part occupied

4. by appellant, to the appellee. It also appears that appellant knew of the lease to appellee, acquiesced therein, and paid to him a pro rata share of the rent for the month of February, and on March 1 tendered to him the rent due for that month. These facts bring the case within the doctrine announced in the case of *Cressler v. Williams* (1881), 80 Ind. 366: "Where one claims to be the lessor, and the tenant in possession acquiesces in the claim, and pays the rent, the presumption is that the relation of landlord and tenant exists, and this presumption will prevail, unless overcome by countervailing evidence. *Taylor, Landlord and Tenant*, §22, n." See, also, *Dunshee v. Grundy* (1860). 15 Gray 314; *Lindley v. Dakin* (1859), 13 Ind. 388.

On April 1 appellant failed to pay or tender to appellee

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the rent due on that day, and this failure, under the facts found, was sufficient, under the provisions of the statute, to determine his lease and render his holding over unlawful. §8059 Burns 1908, §5213 R. S. 1881; *Thomas v. Walmer* (1897), 18 Ind. App. 112; *Ingalls v. Bissot* (1900), 25 Ind. App. 130.

Having concluded that the findings warranted the conclusion that the relation of landlord and tenant existed between appellant and appellee, it follows that this

5. was an action within the jurisdiction of a justice of the peace. §8071 Burns 1908, §5225 R. S. 1881.

Judgment affirmed.

CASTLE v. CLARK, ADMINISTRATRIX.

[No. 6,630. Filed January 25, 1910.]

1. **APPEAL.—Record.—Complaint.—Paragraphs.—Failure to Present.**—Rulings upon the first paragraph of a complaint will not be reviewed, on appeal, where the transcript fails to show the filing thereof, and where such paragraph cannot be separated from the second. p. 193.
2. **APPEAL.—Record.—Instructions.—Questioning.**—Where the transcript merely shows the filing of certain instructions, their signature by the judge and by the appellant, but fails to show that such instructions were given at the trial, no reversible error is shown. p. 194.
3. **APPEAL.—Defective Record.—Amendments.—Certiorari.**—The Appellate Court is exceedingly liberal in permitting amendments to transcripts on appeal. p. 195.
4. **APPEAL.—Presumptions.**—The presumption, on appeal, is that the trial court committed no error. p. 195.
5. **WITNESSES.—Credibility.—Reputation for Morality.—Evidence.**—Evidence of a party's reputation for morality is admissible, in a civil case, as affecting his credibility, but such evidence should be explicitly confined to such purpose. p. 195.
6. **APPEAL.—Weighing Evidence.—Accounts.**—The Appellate Court cannot weigh conflicting evidence in an action on an account. p. 196.

From Lake Circuit Court; *Willis C. McMahon*, Judge.

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Action by John M. Castle against Sarah Jane Clark, as administratrix of the estate of Perry D. Clark, deceased. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Bruce & Bruce, for appellant.

John B. Peterson and Schuyler C. Dwyer, for appellee.

HADLEY, J.—This was an action brought by appellant against appellee on a claim against the estate of appellee's decedent. It is stated in appellant's brief that the complaint consisted of two paragraphs, the first being an itemized claim showing various transactions between the parties, and the second, an account stated in the usual form. A trial resulted in a verdict for appellee, and judgment was rendered thereon in accordance therewith.

Appellant filed a motion for a new trial, which motion was overruled. The overruling of this motion is the only error assigned.

Under this assignment, appellant seeks to present numerous questions on instructions given, on the admission of certain testimony, and alleges that the verdict was not sustained by sufficient evidence. Various objections to the record are pressed upon our attention by appellee, some of which

1. are necessary to be considered at the outset. It is stated in the briefs that the court instructed the jury that since there was no evidence supporting the first paragraph of complaint, the same was withdrawn from their consideration. The giving of this instruction is one of the questions presented. Appellee calls attention to the fact that the record does not show the filing of the first paragraph of complaint, and does not identify any portion of the transcript as being said first paragraph of the complaint. The beginning of the transcript is in the usual form, showing that certain proceedings were had at the court house in Crown Point, Lake county, on September 29, 1905, which

were entered of record in said cause, to wit: "Come now the parties hereto by their respective attorneys, and the plaintiff now files his second and additional paragraph of complaint herein in the words and figures following." Following this is a complaint on an account, stated in the usual form and duly verified. Immediately following this is a verified, itemized account. It has no heading. There is no showing that it was filed, or how it got into the transcript. Its general appearance and its position in the transcript would indicate that it was a part of said second paragraph of complaint. What it is and what relation it has to the pleadings, we have no authentic information; although it is stated in appellant's brief that this constitutes the first paragraph of the complaint. In this state of the record, we would not be warranted in passing upon any rights of the parties to this controversy brought in issue by said alleged first paragraph of complaint.

It is also insisted by appellee, that no question is presented on the instructions sought to be reviewed, for the reason that they are not properly presented by the record. It ap-

2. pears from the record that on February 12, 1906, the court instructed the jury, whether in writing or orally is not shown, and that on February 27 the court entered of record in said cause the following, to wit: "Now again come the parties by counsel, and thereupon instructions numbered one to eleven and signed by the court are now filed in open court, and the same are in the words and figures following, to wit." Following this entry is what appears to be a series of instructions of the court, numbered from one to eleven, at the bottom of which is attached the signature of W. C. McMahan, Judge. After this signature is the entry, that "the plaintiff thereupon excepts separately to instructions one, five and six, as given by the court." At the end of instructions one, five and six, respectively, the following appears: "The plaintiff, John M. Castle, hereby excepts to the giving of the above and foregoing instruction [number-

ing it], this 27th day of February, A. D. 1906, John M. Castle, by Bruce & Bruce, attorneys for plaintiff.”

This is all the record discloses as to the instructions. It will be observed that nowhere is there any record showing that any of said instructions were given to the jury at the trial. Neither is it shown that these were all the instructions given, nor whether said instructions were given at the request of either party, or by the court on its own motion; nor whether said instructions were requested by the appellee and refused by the court, or requested by appellant and given or refused by the court. Nor is it shown whether said instructions were oral or in writing. It certainly would not be claimed by the most liberal practitioner that this court would be warranted in reversing this cause upon either of the alleged instructions thus presented and questioned.

Appellee gave timely notice by her brief of these de-

3. facts in the record, and this court is exceedingly liberal in permitting parties to correct their record, either by issuing writs of *certiorari* or authorizing amendments or corrections, as the case may be. Since this court can have accurate knowledge of what transpires in the lower court from the record alone, it follows that such record must explicitly set out such proceedings so that we can absolutely know that the court actually did the things complained of. The presumption is, and very properly

4. so, that the trial court did not commit error; and we cannot overthrow this presumption upon a bare statement of counsel, or inference not necessarily implied from the other portions of the record, and know that it performed an erroneous act that the record does not show was performed.

This leaves for our consideration two questions. At the trial of the cause, appellant appeared and testified as a witness. Appellee, for the purpose of discrediting his

5. testimony, then called witnesses to testify as to appellant's general reputation for morality in the neigh-

borhood in which he resided. The admission of this testimony was objected to, upon the sole ground that this being a civil action, the character of appellant was not involved. This contention is true, except as affecting his credibility. The record discloses that the court admitted this testimony for the purpose for which it was presented, as affecting his credibility, and it was explicitly limited to this purpose. Under §529 Burns 1908, §505 R. S. 1881, the evidence was competent for this purpose as against the objections urged.

The other question presented is that the evidence is insufficient to support the verdict. It is admitted by the parties

that the verdict was rendered upon the paragraph of 6. the complaint averring an account stated. The evidence as to whether there was an account stated between the parties is unsatisfactory, as evidence in this class of cases usually is. There was testimony from which it might be inferred that there was an account stated. There were admissions of appellant, testified to by witnesses, that imply that no such account had been rendered or settlement had. In this state of the evidence, it has been decided in many cases that this court will not interfere with the finding of the jury. *Hollingsworth v. Pickering* (1865), 24 Ind. 435; *Nickey v. Dougan* (1905), 34 Ind. App. 601.

Judgment affirmed.

WEEKS v. HATHAWAY ET AL.

[No. 6,853. Filed January 25, 1910.]

1. TRIAL.—*Special Findings.—Conclusions of Law.—Exceptions to.—Effect.*—An exception to conclusions of law admits that the facts within the issues are fully and fairly found. p. 201.
2. VENDOR AND PURCHASER.—*Real Property.—Trusts.—Actual Notice.*—A purchaser, without actual notice, who purchases real estate from the legal owner thereof, takes the title thereto, where such legal owner was holding such land in trust under an unrecorded instrument (§3964 Burns 1908, §2982 R. S. 1881). p. 201.

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3. VENDOR AND PURCHASER.—*Real Property.—Trusts.—Notice.*—

Where the actual owner of one-half of a tract of land is in possession of the whole tract, accounting to the owner of the other half in rents, the other owner holding the legal title to the whole tract, a purchaser of the tract, actually knowing that such possessor claimed some title to such tract, takes title to but one-half thereof. pp. 201, 203.

4. VENDOR AND PURCHASER.—*Adverse Claims.—Notice.*—A purchaser is chargeable with notice of another's claim of title, where the circumstances are such that he should have known thereof. p. 202.

From Pulaski Circuit Court; *Truman F. Palmer*, Special Judge.

Suit by Medary M. Hathaway against Frank W. Weeks and another. From a decree for plaintiff, said defendant Weeks appeals. *Affirmed.*

Burson & Burson and *F. L. Dukes*, for appellant.

Henry A. Steis, for appellee.

WATSON, J.—Medary M. Hathaway filed his amended complaint in three paragraphs for the partition of certain lands in Pulaski county, Indiana. In the first paragraph he avers that he and the defendant, Fannie Weeks, are tenants in common of the land described therein, and that he is the owner of the undivided one-half thereof; that Fannie Weeks is the owner of the residue; that Frank Weeks, the appellant, has no interest therein. The second paragraph is substantially the same as the first, except that it is averred therein that the defendant claims some interest in and to the real estate. The third paragraph alleges that the plaintiff is the owner of an undivided one-half and in possession of the whole of said real estate described in said complaint, and that the defendants claim to have some interest, which is a cloud upon the title to plaintiff's one-half thereof.

It is averred that on October 27, 1903, Charles L. Weeks, husband of defendant, Fannie Weeks, purchased from plaintiff, for a valuable consideration, to wit, \$2,500, an undivided one-half of the land; that by a "written declaration

of trust" the purchaser agreed to hold the land in trust, one-half for himself, the other half for the plaintiff; that the deed to said Charles L. Weeks was made for that purpose, and for none other; that during the lifetime of said Charles L. Weeks he did hold it in trust, in pursuance of said agreement; that Charles L. Weeks departed this life, and a short time prior to his death he executed a deed to his wife, Fannie Weeks for the real estate described in the complaint, and delivered it to the plaintiff to be delivered to her after his death; that said deed was afterwards delivered to said Fannie Weeks, who accepted it, and accepted the trust therefore accepted and carried out by her said husband; that said plaintiff continued in possession and control of said property, leased it, collected the rents, and thereafter made settlements with said Fannie Weeks, by paying her one-half of said rents; that afterwards, to wit, on March 25, 1905, Fannie Weeks conveyed said real estate to the appellant, Frank Weeks.

To this complaint Fannie Weeks filed her separate answer in two paragraphs: (1) A general denial; (2) specifically denying that she had accepted the deed from Charles L. Weeks with the trust, or with any knowledge of the trust. Frank Weeks filed his answer in two paragraphs: (1) A general denial; (2) alleging that he is a good-faith purchaser from his codefendant, Fannie Weeks, and for a valuable consideration; denying any knowledge of the plaintiff's claim of owning or having any interest in the land described in plaintiff's complaint, and that he was not informed of the claim until after the commencement of the suit. To each of these answers a reply in general denial was filed. Upon the issues thus formed the cause was submitted to the court without the intervention of a jury, and upon request it made special findings and stated conclusions of law thereon. To the conclusions of law each defendant excepted.

The errors assigned are that the court erred in stating each

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of the conclusions of law, and that the court erred in overruling the appellant's motion for a new trial.

The findings are, in substance, as follows: On April 1, 1903, William Smith and the Great Western Canning Company owned the lands described in the complaint, and on said day, by warranty deeds, sold and conveyed them to Medary M. Hathaway for the sum of \$5,000, which deeds were duly recorded on October 27, 1903, on which day said Hathaway and wife sold and conveyed to Charles L. Weeks one-half interest in the real estate described in the complaint for the sum of \$2,500, which deed purported on its face to convey the whole of said real estate to said Charles L. Weeks, and made no reference to the declaration of trust, which is as follows:

"Be it known by this instrument that the deed this day executed by Medary M. Hathaway and wife, Elsie L. Hathaway, to the undersigned Charles L. Weeks, for lots * * * is intended as a conveyance in trust only, that is to say, that said land before described is to be owned and is owned by the grantee, Charles L. Weeks, and the grantor, Medary M. Hathaway, in equal shares, each the undivided one-half thereof. Given this 27th day of October, A. D., 1903.

Charles L. Weeks."

This instrument and the deed from Hathaway and wife to Charles L. Weeks were executed at the same time. The deed was thereafter duly recorded, but said declaration of trust was not recorded. Prior to the death of Charles L. Weeks he executed a deed to Fannie Weeks, his wife, and delivered it to Medary M. Hathaway, to be by him delivered to Fannie Weeks after the death of her said husband, and afterwards Hathaway did deliver said deed to her, which purported on its face to convey all the real estate embraced in the deed from Hathaway and wife to Charles L. Weeks. But at the time said Fannie Weeks received said deed she did so with full knowledge that Medary M. Hathaway was in possession of said real estate under some form of declara-

tion of trust existing between said Hathaway and Charles L. Weeks, and she knew at the time of the acceptance of said deed that her husband owned but a half interest in said real estate, and that said Hathaway owned the other half. During the life of Charles L. Weeks said Hathaway had made settlements with him, paying him one-half the rents so collected, and made settlements with Fannie Weeks, paying her one-half the rents so collected, which amounts were accepted by her. Afterwards, to wit, on March 25, 1905, Fannie Weeks executed and delivered a warranty deed to Frank Weeks, a brother of decedent, for the sum of \$2,500, for the land embraced in the deed from decedent to her, purporting to convey the whole thereof, which deed was duly recorded in the recorder's office of Pulaski county, on May 1, 1905. At the time said Frank Weeks accepted said deed he knew that said Hathaway was in possession thereof, and had been since the execution of said declaration of trust.

The tenth finding is as follows: "When the defendant Frank Weeks accepted the conveyance from the defendant Fannie Weeks, as heretofore found, he, said Frank Weeks, knew that a part of the real estate in question was occupied by tenants, and that they were holding possession as such tenants, and that said Medary M. Hathaway was receiving rental therefor, and that he had made division of said rental with said Charles L. Weeks during his lifetime, and with said Fannie Weeks after the death of said Charles L. Weeks, and that said Medary M. Hathaway was claiming to be the owner of an interest in said real estate, under some form of agreement between said Hathaway and said Charles L. Weeks, executed during the lifetime of said Charles L. Weeks, and said Frank Weeks knew, at the time he received said conveyance from Fannie Weeks, that said Fannie Weeks had received said real estate from her husband, Charles L. Weeks, under some form of agreement existing between said Medary M. Hathaway and said Charles L.

Weeks, upon which was based the claim of said Hathaway to be the owner of a part of said real estate."

Upon the facts found the court states as its conclusions of law thereon that the appellant and appellee Hathaway each own one-half of the real estate described in the

1. plaintiff's complaint, in fee and as tenants in common; that appellee Fannie Weeks has no interest therein. The appellant, having excepted to the conclusions of law, thereby admitted that the facts had been fully and fairly found within the issues. *Blair v. Curry* (1898), 150 Ind. 99; *Connor v. Andrews Land, etc., Co.* (1904), 162 Ind. 338; *Dinius v. Lahr* (1905), 36 Ind. App. 425.

The sole question here is, Was the appellant a good-faith purchaser for value and without notice? The statute (§3964 Burns 1908, §2932 R. S. 1881), provides:

2. "When a deed purports to contain an absolute conveyance of any estate in lands, but is made, or intended to be made, defeasible by force of a deed of defeasance, bond or other instrument for that purpose, the original conveyance shall not thereby be defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law, within ninety days after the date of said deed."

The Supreme Court, in construing this statute in the case of *Crassen v. Swoveland* (1864), 22 Ind. 427, held that actual

notice is required to defeat a purchaser when the defeasance has not been recorded. Therefore, under this construction, the appellee Hathaway and wife, having made an absolute conveyance of the real estate, which is the subject of this controversy, to Charles L. Weeks, and at the same time said Weeks executed to Hathaway an instrument by which said deed was made defeasible, it was necessary, in the absence of the recording of said instrument

by the appellee Hathaway, that the appellant have actual notice of this instrument, or he would be regarded as an innocent purchaser. However, statutes like unto this have been the subject of much discussion and conflicting opinions in many of the states as to the construction of the words "actual notice," as used in the statutes.

In the case of *Exon v. Dancke* (1893), 24 Ore. 110, the court, in discussing a statute like the one before quoted, said: We "assume the true rule to be, that notice, within the meaning of the statute, must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would 'put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict, with that which he is about to purchase.' *Brinkman v. Jones* [1878], 44 Wis. 498."

When a purchaser does not have actual notice of facts which would create a trust, he ought not to be charged with notice, unless the circumstances are such as to enable

4. a court to say not only that he might have acquired it, but that he would have acquired it, but for his gross negligence. *Wilson v. Wall* (1867), 6 Wall. 83, 18 L. Ed. 727; *Stanly v. Schwalby* (1896), 162 U. S. 255, 276, 16 Sup. Ct. 754, 40 L. Ed. 960.

It is said in 4 Cent. L. J. 122: "In this country and in England the doctrine seems quite firmly established, that open, notorious, unequivocal and exclusive possession of real estate, under an apparent claim of ownership, is notice to the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature." See, also, *Kirkman v. Moore* (1903), 30 Ind. App. 549, and cases cited.

In the case of *Dyer v. Eldridge* (1894), 136 Ind. 654, the court said: "Actual possession of lands under a claim of title is sufficient notice of such claim to put others on inquiry as to the extent and nature of the claim."

Whether under the later decisions of our State the rule, as announced in the case of *Crassen v. Swoveland*, *supra*, has

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been modified as to the construction of the words

3. "actual notice," or whether, from all the facts and circumstances surrounding the transaction between the parties to this action, the appellant should have had, and did have, actual notice as well as constructive notice from the facts found, is unnecessary for us to decide, for the reason that the court found that appellant did have actual notice that Hathaway had an interest in said real estate at the time he purchased from appellee Fannie Weeks. He, therefore, will not be regarded as a *bona fide* purchaser in good faith.

We have examined the record, and find the evidence justifies the findings of the court. There being no available error, the judgment is affirmed.

LAYTON ET AL. v. HERR.

[No. 6,718. Filed January 26, 1910.]

1. DESCENT AND DISTRIBUTION.—*Childless Widow.—Heirs.—Expectancies.*—Under §2487 R. S. 1881 a childless second or subsequent wife, the husband's children by a former marriage being alive, took a fee simple in one-third of his real estate, his children being her forced heirs, such children having merely a fixed expectancy during her life. p. 205.
2. DEEDS.—*Quitclaim.—Estates in Expectancy.—Estoppel.*—A quitclaim deed does not operate upon an estate in expectancy, and the grantor is not estopped from claiming such estate when it becomes vested. p. 205.
3. DEEDS.—*Expectant Estates.—Childless Widow.—Heirs.—Estoppel.*—Under §§3020, 3023 Burns 1908, Acts 1899, p. 131. §3, and Acts 1907, p. 71, §1, a father's children by a prior marriage are estopped from claiming title as forced heirs of their father's subsequent childless widow, where they have conveyed such land and have received pay therefor. p. 206.
4. DEEDS.—*Conveyance of Expectancy.—Requisites.*—A conveyance of an expectancy is never presumed, is always viewed with suspicion, and the grantee must show that it was made in good faith, without fraud, and upon the receipt of full value. p. 206.

5. **DESCENT AND DISTRIBUTION.**—*Childless Widow.*—*Conveyance by Children.*—*Burden of Proof.*—*Curative Statutes.*—Sections 3020, 3023 Burns 1906, Acts 1899, p. 131, §3, and Acts 1907, p. 71, §1. were enacted to prevent children of a father who subsequently left a childless widow from afterwards claiming lands inherited from such widow, which they had sold and for which a fair price had been received, but the burden is upon the grantee to prove that such children intended to convey their expectant estate. p. 207.
6. **TRIAL.**—*Special Findings.*—*Failure to Find Certain Facts.*—*Effect.*—A failure to find certain facts is a finding against the party having the burden of proving such facts. p. 207.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Suit by Benjamin M. Herr against George M. Layton and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

Martin A. Morrison, for appellants.

W. R. Moore, for appellee.

HADLEY, J.—Appellee sued appellants to quiet title to certain lands, described in the complaint, in Clinton county, Indiana. The special findings show that in the year 1887, William Layton died intestate, seized of the lands described in the complaint; that he left surviving him, as his heirs at law, Elpha E. Layton, his second widow who was childless, and Abraham Layton, Henry Layton, Margaret Ostler and Sarah A. Parvis, children by a former marriage; that in April, 1888, said Abraham Layton and his wife executed to Henry Layton a quitclaim deed, in usual form, to the tract of land of which William Layton died seized, for the expressed consideration of \$100. In June, 1888, partition was had, whereby twenty-three acres of said land was set off to the widow, Elpha E. Layton, and the remainder was set off to the children of William Layton. Afterwards the portion so set off to the children was sold to Henry Layton, on petition of William Layton's administrator, to pay debts. In July, 1898, said Abraham Layton died intestate, leaving appellants (his children) surviving him, and in July, 1899,

Margaret Ostler, sister of Abraham, died, leaving no heirs except her husband, Robert Ostler. In July, 1902, said Elpha E. Layton, widow of William Layton, died intestate. In September, 1902, Sarah A. Parvis conveyed to Henry Layton all of her interest in said lands. Henry Layton died in May, 1903, and his heirs conveyed the whole of said tract to appellee in November, 1903. There are other proper findings, but the foregoing is sufficient to present the questions raised on this appeal.

Upon the findings the court stated its conclusions of law, to the effect that appellee was entitled to have his title quieted to the whole of said land. Appellants insist that, under said findings, the court should have concluded as a matter of law that they were entitled to an undivided one-third of the twenty-three acres set off to Elpha E. Layton as widow of William Layton; while appellee contends that, under the quitclaim deed of Abraham Layton, his heirs are estopped to claim any interest whatever in said land by virtue of §§3020, 3023 Burns 1908, Acts 1899, p. 131, §3, and Acts 1907, p. 71, §1.

At the time of the death of William Layton the law (§2487 R. S. 1881) was such that his widow took one-third of his land in fee, without power to alienate, if any de-

1. scendants of the husband from a former marriage were alive at her death, since said descendants were the "forced heirs" of such widow, and as such could not be disinherited. But such descendants acquired no title from the ancestor, and had no present interest, but merely a fixed expectancy during the life of such widow. *Burget v. Merritt* (1900), 155 Ind. 143.

It is well settled that a quitclaim deed will not operate upon an estate in expectancy, and a grantor in such a deed is not estopped from claiming such estate when it

2. becomes vested. *Avery v. Akins* (1881), 74 Ind. 283; *Bryan v. Uland* (1885), 101 Ind. 477.

The rule just stated, as to estoppel, is ineffective,

3. where the case falls within the purview of §§3020, 3023, *supra*.

In the case of *Bryan v. Uland, supra*, the court used this language: "A quitclaim deed is effectual to pass the estate which the grantor has at the time it is made, and no more."

And while an expectant estate might be conveyed, such a conveyance is always viewed with suspicion. It is

4. never presumed, and to render it valid it must be shown that the conveyance was in good faith; that there was no fraud practiced upon either the heir or the ancestor, and that a full value was paid. *McClure v. Raben* (1890), 125 Ind. 139, 9 L. R. A. 477.

In the case before us, Abraham Layton, at the time he made the deed in question to Henry Layton, was the owner of one-sixth of said real estate, as the heir of his father. This was his present interest and his only present interest in said real estate, and this present interest was not affected by the interest of the widow. There is nothing in the deed or the finding of facts that shows that he intended to convey any more than his present interest, or that Henry Layton, the grantee, expected to receive any more than such interest. There is no finding that Henry Layton paid the full value of both the present and expectant interest of Abraham Layton in said land. In fact, there is no finding that he paid anything at all, or that Abraham Layton received anything. The most that is found is that Abraham Layton's quitclaim expressed a consideration of \$100.

In this posture of affairs, it is our opinion that the curative acts relied upon by appellee and contested by appellants have no application. The first of these curative acts was passed in 1889. Acts 1889, p. 430. Section two of this act, which is the section sought to be made applicable here, was superseded by the act of 1899 (§3020, *supra*), and a subsequent act of 1907 (§3023, *supra*).

Each of these curative statutes is made to apply to con-

veyances in fee of all or any part of lands affected by the interest of such second or subsequent childless wife.

5. The clear intent and purpose of the legislature in the passage of such acts being to prevent heirs within the class designated from selling the whole of said lands for a fair price, and thereafter, upon the death of the widow, claiming and recovering in addition the value of the widow's interest. But clearly such statutes should not be applied where, as here, it does not appear that a sale or purchase of the expectant interest was either contemplated or intended. So to apply the statute would often perpetrate as great a fraud as to withhold its application in proper cases. This case affords an excellent illustration of this. At the time the deed was made, Abraham Layton had a one-fourth expectant interest as forced heir of his stepmother. Subsequent to the conveyance, and before the death of the stepmother, a sister of Abraham died without issue. If appellee's contention be true, Henry Layton, by the deed of Abraham Layton, not only acquired the interest of Abraham in the stepmother's land, but also acquired the interest that Abraham or his descendants were entitled to inherit from the sister Margaret, an interest that certainly no one would contend was intended to be conveyed by Abraham's deed, since at that time Margaret was in life. The burden was upon appellee to show that Abraham Layton intended, by his deed to Henry Layton, to convey not only his expectant interest in his stepmother's estate, but his share of his sister Margaret's expectant interest. The special finding does not show

6. either of these facts, and is therefore a finding against him. Under the facts thus found, appellants are entitled to one-third of the land which the widow inherited from William Layton, as heirs of their father, Abraham Layton.

Judgment reversed, with instructions to restate the conclusions of law in accordance with this opinion, and enter judgment accordingly.

REICHERS v. DAMMEIER.

[No. 6,676. Filed January 26, 1910.]

1. EVIDENCE.—*Former Testimony of Nonresident Witness.*—The testimony of a nonresident witness upon a former trial is admissible in a subsequent trial. p. 209.
2. TRIAL.—*Instructions.—Misleading.*—An instruction which, considered with others, does not mislead the jury, is harmless. p. 210.
3. ASSAULT AND BATTERY.—*Damages.—Self-Defense.—Instructions.*—An instruction that self-defense cannot be carried further than the necessity of the case demands, that "a person exercising such right may safely act upon appearances," and that "the danger must be judged from his standpoint if he entertained an honest belief in its existence," is not prejudicial to defendant. p. 210.
4. ASSAULT AND BATTERY.—*Excessive Force.—Instructions.*—An instruction that in repelling an assault the defendant had no right to use excessive force, and if he did, he would be liable for such excess, is not erroneous. p. 210.
5. APPEAL.—*Death.—Affirmance.*—Where the appellee died, after appeal taken, a judgment of affirmance will be considered as made on the date of submission of the cause. p. 211.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Ernest H. Dammeier against Fred D. Reichers. From a judgment for plaintiff, defendant appeals. *Affirmed.*

James K. Stinson, Frank Meeker and E. D. Crumpacker, for appellant.

N. L. Agnew and Bruce & Bruce, for appellee.

RABB, P. J.—This action was brought by the appellee against the appellant to recover damages for an alleged assault and battery committed by the appellant on the appellee.

The case was put at issue, and two jury trials were had, the first resulting in a disagreement of the jury, the last, in a verdict favorable to the appellee. Appellant's motion for a new trial was overruled, and judgment rendered upon the verdict.

The error relied on for a reversal is the action of the

court below in permitting appellee to read in evidence the testimony of a witness, given at the former trial of the cause, and taken down by the official stenographer—the witness being absent at the trial, and a nonresident of the State—and the giving by the court of instructions six, nine and twelve.

The question of the admissibility in evidence of the testimony given on a former trial by an absent witness, who is a nonresident of the State, is an open question in

1. this State, never having been authoritatively presented to or decided by the Supreme or Appellate Court. *Wabash R. Co. v. Miller* (1902), 158 Ind. 174; *Wabash R. Co. v. Miller* (1901), 27 Ind. App. 180; *Schearer v. Harber* (1871), 36 Ind. 536.

It is appellant's contention that at the common law it was not competent to give in evidence the testimony of a witness taken at a former trial, unless the witness was dead, insane or beyond seas, and that the term "beyond seas" means outside of the national realm, and does not apply to a witness whose residence is known, and is in some other part of the realm.

It is argued that the statute makes ample provision for taking the depositions of nonresident witnesses, and that therefore the rule invoked to admit this testimony is not applicable, and some authorities are cited to support this contention. There is a conflict in the decisions of the court's of last resort as to the proper meaning of the term "beyond seas," as used in the statute of limitations; but in this State the term "beyond seas," when used in this connection, is held to mean beyond the limits of the State. *Stephenson v. Doe* (1847), 8 Blackf. 508. And as applied to the question here presented, it is almost universally held that where a witness is a nonresident of the State, and absent at the time of the trial, his former testimony may be proved. 2 Wigmore, Evidence, §1404, and cases cited; 5 Ency. Ev., 904, and cases cited.

It is true the statutes of this State provide for the taking of depositions of nonresident witnesses, but the courts of this State have no power to render effective this statutory provision, and are as helpless to compel the attendance of witnesses before its commissioners in Illinois and Ohio as they are to compel the attendance of witnesses before like commissioners in France or Australia, and the reason of the rule admitting the former testimony of nonresident witnesses is the lack of power and authority of the court to compel the witness to give his testimony, and therefore the necessities of the case require that testimony given at a former trial may be admitted.

Instruction six, complained of by appellant, is not a mandatory instruction. It is criticised, as requiring the appellant to prove that the danger, justifying him in re-

2. sorting to force in self-defense, was such as would lead a reasonably prudent man to believe in its reality.

The instruction in question does not undertake to give the limitations of the rule, and is not technically incorrect. Standing alone, it might be misleading, but when considered in connection with other instructions given to the jury, as it must be, it could not have misled the jury.

It is insisted that instruction nine does not clearly state the law, because it tells the jury that self-defense cannot be carried further than the necessity of the case de-

3. mands. The same instruction, however, tells the jury that "a person exercising such right may safely act upon appearances," and "the danger must be judged from his standpoint, if he entertained an honest belief in its existence." This instruction could not have misled the jury to the appellant's harm.

Instruction twelve, complained of, tells the jury that a person in repelling an assault has no right to use greater force than, under the circumstances, he believes to be

4. reasonably necessary for self-protection, and if he does, he will be liable for the excessive force used. No

error intervened in giving this instruction. The instructions, taken as a whole, were exceedingly favorable to the appellant.

5. Since the submission of the cause, the death of the appellee has been suggested to the court.

Judgment of the court below affirmed, as of the date of the submission of the cause.

STAHL ET AL. v. ILLINOIS OIL COMPANY.

[No. 6,591. Filed January 27, 1910.]

1. **CONTRACTS.—Covenants.—Gas and Oil.—“Lease.”**—A contract for the sinking of gas and oil wells is not strictly a “lease,” as that word is ordinarily used. p. 213.
2. **CONTRACTS.—Construction.—Gas and Oil.**—In construing contracts for the sinking of oil and gas wells the courts will reject contradictory provisions and determine the true meaning thereof from the general scope and intent of the contract. p. 213.
3. **CONTRACTS.—Construction.—Conduct of Parties.**—In determining the meaning of a contract the courts may consider the acts of the parties thereunder. p. 214.
4. **PLEADING.—Presumptions.**—The presumption is that a pleading contains all of the facts favorable to the pleader. p. 214.
5. **CONTRACTS.—Consideration.—Gas and Oil.—Royalties.—Penalties.**—The real consideration for a contract giving to the owner of land a royalty in the oil and gas produced therefrom and a monthly rental for delay in the completion of wells, is the royalty, the rentals for delay being incidental. p. 214.
6. **CONTRACTS.—Oil and Gas.—Royalties.—Rentals.**—A contract giving to the owner of a seventy-acre tract of land a royalty of one-sixth of all the gas and oil produced therefrom, and providing that “each location shall consist of ten acres, more or less, and each well shall be due in sixty days from the completion of the last one,” that no well shall occupy more than one acre, and that “each well shall be due in sixty days from the completion of the last one, or a monthly rental of \$5 [shall be paid] for each well due” may be construed to give such rental for delay only in case of the first seven wells. p. 215.

From Adams Circuit Court; *Richard K. Erwin*, Judge.

Action by Samuel Stahl and others against the Illinois Oil Company. From a judgment for defendant, plaintiffs appeal. *Affirmed.*

James T. Merryman and Jesse C. Sutton, for appellants.
Simmons & Dailey, for appellee.

MYERS, C. J.—Appellants brought this action against appellee, to enforce the payment of certain alleged cash rentals claimed to be due under a certain gas and oil contract.

A demurrer to the complaint for want of facts was sustained, and this ruling is here assigned as error.

The contract is made a part of the complaint by exhibit, and is dated April 15, 1895. It grants unto the lessee all the gas and oil in and under certain real estate, described, with the exclusive right to enter thereon at all times for the purpose of drilling and operating for oil or gas, etc. It also provides that "unless second party shall commence and complete a well within forty days from date thereof or pay a monthly rental of \$5 until said well is completed, this grant shall become null and void. * * * It is further agreed that the party of the second part shall commence to drill first well in twenty days from date. Each well shall be due in sixty days from the completion of the last one or a monthly rental of \$5 for each well due. Each location shall consist of ten acres more or less and each well shall be due in sixty days from the completion of the last one. It is further agreed that no well shall occupy more than one acre."

The complaint shows that the contract covered seventy acres of land, more or less, in Adams county; that on the date of the contract the land was undeveloped for oil or gas; that, according to the terms of the contract, seven wells were completed on the land; that thereafter three additional wells were completed, but that more than sixty days elapsed between the completion of each of the additional wells; that the last three wells were sunk by appellee without objection or protest from anyone; that there is no express limitation

in the contract as to the number of wells over seven; that appellants by this action sought to collect cash monthly rentals for the time over sixty days between the completion of each of the last three wells.

Appellants' theory is that for the time exceeding sixty days between the completion of wells No. 7 and No. 8, and so on up to the completion of well No. 10, appellee was liable for a monthly rental of \$5. While appellee insists that having completed well No. 7 without any default, the sixty-day limit did not apply to the last three wells.

The instrument which was the foundation of this action is not a lease, as the word "lease" is usually interpreted (*Hancock v. Diamond Plate Glass Co.* [1904], 162

1. Ind. 146; *New American Oil, etc., Co. v. Troyer* [1906], 166 Ind. 402), although similar instruments have been so called. It is a covenant by the owner of land to another person, whereby the latter has the exclusive right to enter upon and explore the land for gas and oil, and prosecute such business, occupying only such portion necessarily required for that purpose, which in the instrument or contract before us is fixed at not to exceed one acre for each well.

It has been said that gas and oil contracts, such as the one before us, belong to a class of their own, and that courts will "look critically into such instruments for the real in-

2. tention of the parties, because it so frequently happens that they cannot, on account of incongruous provisions, be enforced according to the strict letter of the contract." *Ohio Oil Co. v. Detamore* (1905), 165 Ind. 243.

While it is true that the provisions in this class of contracts, as a rule, are ambiguous, indefinite and uncertain, it is also true that the parties are to be limited to the contract actually made. And for the purpose of ascertaining the true meaning of the language employed courts "will look to the nature of the instrument and the conditions under which it was made, the situation of the parties, the nature of their

business, and the interests to be protected, not for the purpose of applying it, but for the purpose of effectuating their intention." *Merica v. Burget* (1905), 36 Ind. App. 453, and cases cited. See, also, *Erie Crawford Oil Co. v. Meeks* (1907), 40 Ind. App. 156.

In the case of *Ohio Oil Co. v. Detamore, supra*, it is said: "The mutual understanding and intent of the parties, as to the purpose, scope and ultimate object to be attained by the contract, that inspired and accompanied its execution, is controlling, and must be determined, not by detached provisions, but by viewing the instrument as a whole."

Another rule of construction, applicable to ambiguous and uncertain provisions supposed to be expressive of the contract as actually agreed upon, requires the court to

3. take into consideration the acts and conduct of the parties in relation to the contract under consideration. *Ralya v. Atkins & Co.* (1901), 157 Ind. 331; *Scott v. LaFayette Gas Co.* (1908), 42 Ind. App. 614.

It must also be remembered that all well-pleaded facts are presumed to be true, as against a demurrer, and any omitted facts are to be considered as adverse to the

4. pleader, "under the general presumption that a party will set forth all the facts favorable to his case." *Cushman v. Cloverland Coal, etc., Co.* (1908), 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. 391.

The general purport of the contract here exhibited is clearly expressive of the purpose of the parties. It was effective to give one not the owner of the land therein

5. described the exclusive right to enter thereon, and, by means of wells, to seek, acquire and reduce to actual possession and control the natural gas or oil which might thus be obtained. For this privilege the covenantor agreed to pay the covenantees for one-sixth of all oil produced on the land. This latter provision was no doubt the real incentive on the part of the owners for the execution of the contract, and not the stated cash monthly rental, for it has

been said "that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered." *Gadbury v. Ohio, etc., Gas Co.* (1904), 162 Ind. 9, 62 L. R. A. 895.

Only by the sinking of wells could the land be explored and the ultimate object of the contract be attained. The extent of the exploration of the land for oil and gas, which is the essence of such contracts (*Dill v. Frazee* [1907], 169 Ind. 53), depends upon the number of wells completed.

That was a subject about which the parties had a right to agree, and furnished a reason for incorporating into the contract the provision that "each location shall consist of 6. ten acres, more or less." This provision, together with the fact that the entire tract contained seventy acres, more or less, strongly implies that seven wells would satisfy the terms of the contract for the sinking of wells, but not necessarily the maximum number of wells which might be put down. In the light of all the facts before us, the contract will be so construed.

Judgment affirmed.

C. CALLAHAN COMPANY ET AL. v. MICHAEL ET AL.

[No. 6,650. Filed January 27, 1910.]

1. LANDLORD AND TENANT.—*Leases.*—*Holding over.*—"Refusal of Premises."—A lease giving to the lessee "the first refusal of the premises for another five years" gives him an option for renting the premises for five years longer at the same terms. p. 218.
2. LANDLORD AND TENANT.—*Extensions.*—*Options.*—*Holding over.*—*Notice.*—A tenant having an option on an extension of his lease for a definite time and who merely holds over, thereby becomes bound for the additional term, notice of the tenant's intention to hold not being required unless stipulated for in the lease. p. 219.
3. LANDLORD AND TENANT.—*Leases.*—*Right to a Renewal.*—*Holding over.*—Where a lease, by clear and explicit language, gives to the lessee a right to a renewal at the expiration of the lease, the mere holding over of such lessee is not sufficient to show an election to renew. p. 219.

4. LANDLORD AND TENANT.—Leases.—Extensions.—Holding over.—

A lease giving to the lessee "the first refusal of said premises for another term of five years, upon the same terms and conditions as expressed in this lease, except as to the amount of rent to be paid, which said lessor is to fix," gives to the lessee a right to hold over without notice, and thus secure the extended term of five years, and the lessor's acceptance of the same rent for the first quarter of the first year after the expiration of the first term fixes the rent for the subsequent term. p. 220.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by Cora Michael and others against the C. Callahan Company and others. From a judgment for plaintiff, defendants appeal. *Reversed*.

Edwin P. Hammond, William V. Stuart, Daniel W. Simms and *Crane & McCabe*, for appellants.

R. P. Davidson and *Allen Boulds*, for appellees.

COMSTOCK, J.—Appellees commenced this action in the Superior Court of Tippecanoe County, against the appellants, to recover possession of certain real estate and damages for its detention. The complaint was amended by adding Thomas C. Day as a party defendant, who afterwards filed a disclaimer. A change of venue was taken to the court below, where, upon issues joined, the cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon in favor of appellees. Over appellants' motion for judgment in their favor on the special findings, judgment was rendered that the appellees should recover from appellants the possession of the premises in question, particularly described, and of appellant C. Callahan Company the sum of \$1,035 and costs, and that defendant Day had no interest in the matters in controversy.

The errors assigned and relied upon question the correctness of each of the conclusions of law.

The facts specially found by the court show that Thomas C. Day, by an instrument in writing, signed by both parties and duly recorded, leased the real estate in controversy to

appellant C. Callahan Company for the term of five years, commencing May 1, 1899, and ending May 1, 1904, at a rental of \$900 per year, payable in installments of \$225 at the end of each quarter; that under said lease appellant company entered into possession of the premises and continued in possession during the five years, paying rent as stipulated in the lease, and at the expiration of said five years continued in possession thereof, paying rent until May 1, 1905, in accordance with the terms of said lease, no new agreement being made between the parties in reference to the occupancy of said premises. On April 13, 1905, being a few days before the expiration of the first year of the occupancy after the expiration of the five years, Day, by written contract, leased the premises to appellees for the term of seven and one-half years, commencing May 1, 1905; that appellant C. Callahan Company learned of said second lease soon after its execution, and then, for the first time, claimed that it had a right to occupy said premises under said first lease; that said appellant refused to recognize appellees' lease, has continued to occupy said premises up to the present time, and has never made any contract or lease with anyone concerning said premises or the right of possession, other than the lease which was entered into with said Day. About May 1, 1905, appellee verbally demanded of appellant C. Callahan Company the possession of the premises, which was refused. Three months prior to May 1, 1906, appellees and Day gave appellant C. Callahan Company a written notice to surrender the possession of the premises on May 1, 1906. It is also found that at the expiration of five years from May 1, 1899, said appellant continued to occupy the premises described in said lease, without giving to said Day any notice of any kind that it would continue said lease for another term of five years, or that it expected to occupy said premises for a longer term than the first five years named in said lease; that on August 1, 1904, when said appellant paid to said Day the sum of

\$225 as rent for said premises from May 1, 1904, to August 1, 1904, nothing whatever was said by said appellant or by said Day concerning its remaining in possession of said real estate, or the extension or continuance of said lease; that at different times after the execution of the second lease the appellees refused to accept payment of rent from appellant company.

A copy of said first lease is set out in the special findings, and contains the following provision:

“It is further agreed that at the termination of this lease the parties of the second part are to have the first refusal of said premises for another term of five years, upon the same terms and conditions as expressed in this lease, except as to the amount of rent to be paid, which said lessor is to fix.”

It is the contention of appellant C. Callahan Company that, “under the above stipulation, when said appellant held over after the first five years, and thereafter paid the same rent provided for in the lease, it made an election to hold for an additional five years, and that said Day, by accepting said rent, thereby fixed the amount thereof for said additional five years, and that the contract thereby became established, whereby said appellant became a tenant for an additional five years from May 1, 1904, and that neither party could change this contract without the concurrence of the other, and that it could only be changed by a new contract upon a valid consideration, or by an actual surrender of the premises by the C. Callahan Company to Day or to the appellees, and by their acceptance thereof.”

The provision that “the parties of the second part are to have the first refusal of said premises for another five years,” meant that they should have an option for renting

1. the premises for five years longer at the same terms.

Tracy v. Albany Exchange Co. (1852), 7 N. Y. 472, 57 Am. Dec. 538.

Where a lease provides that the tenant may have at his

option an extension for a specific time after the expiration of the term agreed upon in the lease, the mere holding

2. over after the expiration of the specific term will constitute an election to hold for the additional or extended term, and the tenant after holding over beyond the first term, without any new arrangement, is bound for the additional or extended term, as fully and completely as though that term had been originally included in the lease when executed. *Andrews v. Marshall Creamery Co.* (1902), 118 Iowa 595, 92 N. W. 706, 96 Am. St. 411, 60 L. R. A. 399; *Remm v. Landon* (1909), 43 Ind. App. 91, and cases cited. In such case, if the lease does not provide that notice shall be given by the tenant of his election, his merely remaining in possession after his term has expired is sufficient, and binds both him and the landlord for the additional term. Wood, Landlord and Tenant, p. 678.

In Taylor, Landlord and Tenant (7th ed.), p. 278, the author says: "Sometimes, instead of a covenant for a renewal, it is agreed that the tenant may have the privilege or option of a further term. In this case, if notice is stipulated for, it must be given; but, if not stipulated for, the tenant's mere continuance in possession and paying rent, though with no express notice of his desire for the further term, entitles and binds him thereto." *Kramer v. Cook* (1856), 73 Mass. 550; *Pechl v. Bumbalek* (1898), 99 Wis. 62, 74 N. W. 545; *Harding v. Seeley* (1892), 148 Pa. St. 20, 23 Atl. 1118; *Mershon v. Williams* (1899), 62 N. J. L. 779, 42 Atl. 778; *Clarke v. Merrill* (1871), 51 N. H. 415; *Delashman v. Berry* (1870), 20 Mich. 292, 4 Am. Rep. 392.

There are cases recognizing the distinction between the privilege of an extension and a right to a renewal. The extended or additional term is one provided for in the

3. lease itself, and the mere enjoyment of the privilege by continuing in possession is enough to bring the extended occupancy within the original contract; but an option of a renewal would seem to imply that the parties con-

templated some affirmative act by way of the creation of an additional term. It has been held in some jurisdictions that the mere holding over is sufficient evidence of an election to renew, even where that is the privilege given in the lease. *Andrews v. Marshall Creamery Co.*, *supra*. But in this State, it has been held that the mere holding over is not sufficient to show an affirmative election to renew the lease for an additional term. *Thiebaud v. First Nat. Bank* (1873), 42 Ind. 212. The distinction between the privilege of extension and the privilege of renewal must appear from the language employed.

“In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended.” 2 Underhill, Landlord and Tenant, p. 1362.

Appellant C. Callahan Company was given the privilege of a further five years upon the same terms as those stipulated in the lease, except as to the amount of rent to

4. be paid, which amount was to be fixed by the lessor.

The five years expired, and said appellant remained in possession and paid rent for the first quarter according to the terms of the lease, which rent was accepted by the lessor. Day, and no new or other agreement was made. These facts, under the decisions in this State, show the extension of the lease for another term of five years, and the lessor by accepting said rent fixed the amount to be paid under the extension.

Judgment reversed, with instructions to restate the conclusions of law in favor of appellant C. Callahan Company, and to render judgment in accordance with this opinion.

WASEM, TRUSTEE IN BANKRUPTCY, v. RABEN ET AL.

[No. 6,923. Filed January 27, 1910.]

1. HUSBAND AND WIFE.—*Wife's Powers.—Contracts.—Suretyship.—Real Property.*—A married woman's separate power to contract is denied only in cases of suretyship, sales or mortgages of real estate, and executory contracts to sell or mortgage real estate. p. 224.
2. HUSBAND AND WIFE.—*Partnership.—Agency.*—A married woman may become a partner with her husband, borrow money from him, be sued by him, or appoint him as her agent. p. 225.
3. FRAUD.—*Husband and Wife.—Ancient Policy.*—The relation of husband and wife is considered in determining whether fraud exists, but the ancient policy of regarding them as one person is disregarded. p. 226.
4. FRAUD.—*Wife's Separate Property.—Husband's Services.—Recovery for, by Trustee in Bankruptcy.*—The value of a husband's services in managing his wife's separate estate, where he has no community of property nor partnership therein, cannot be recovered from such wife, in an action by the husband's trustee in bankruptcy. *Cooper v. Ham*, 49 Ind. 393, explained. p. 226.
5. EXECUTION.—*Work and Labor.*—Work performed by a husband for his wife upon her separate estate is not subject to execution, nor can it be reached by his creditors. p. 229.

From Posey Circuit Court; *Lucius C. Embree*, Special Judge.

Suit by Andrew Wasem, as trustee in bankruptcy of the estate of Theodore H. Raben, against Rosa Raben and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

G. V. Menzies, H. F. Clements and Spencer & Brill, for appellants.

Barker & Zimmerman and George A. Cunningham, for appellees.

Roby, J.—Suit by Andrew Wasem, trustee in bankruptcy of the estate of Theodore Raben, a bankrupt, against Rosa Raben, Theodore Raben and the F. W. Cook Brewing Company, to have the title to certain property declared to be in

said trustee for the purposes of said trust. The complaint is in one paragraph. The issue was formed by a general denial. A special finding of facts was requested and made, and conclusions of law stated thereon, in accordance with which judgment was rendered for the defendants. A motion for a new trial was made and overruled. Overlooking defects in form in such motion, it still requires no further attention, the legal propositions upon which the respective rights of the parties depend being presented by appellant's exceptions to the conclusions of law. The special findings show appellees Raben to be husband and wife, married in 1880. At that time the husband was a young man without property. He clerked in a store until 1885, at which time, the firm for which he worked having been dissolved by death, he with his father and brother formed a new firm, and succeeded to the business and liabilities, he contributing \$800, which sum he had saved from his earnings. In 1893 this firm became insolvent, and its property was sold by a receiver, a large part of its indebtedness, including some of that assumed, remaining unpaid. He thereupon became agent for a brewery company, and continued in such employment until December, 1895, at which time, on account of such agency, he was more than \$2,000 in debt. He endeavored to contract with another company, but was unable to do so on account of lack of credit and inability to give security. Prior to this time Rosa Raben had become the owner of 240 acres of land, which cost her \$1,150 and interest, no part of which was paid by her husband, who had not invested any money or property of his own therein. On July 17, 1896, the American Brewing Company proposed to her that she handle its beer, and she entered into a contract, borrowing \$1,800 from said company, and securing the loan by a mortgage on said real estate. She appointed her husband her agent to manage the sale of beer purchased under said contract, and he has continued to act as such agent. There was no contract for compensation for his services, but during the time of such agency he took

from the profits of that and other business ventures managed by him for said Rosa such sums of money as he required for his individual and family expenses. On December 12, 1892, Rosa Raben purchased for \$900 two lots in Mount Vernon. Afterward she sold all of said land, except forty-six and two-thirds feet front, for \$710, which was paid on the original purchase price. The remainder, \$190, was paid from money earned by keeping boarders and borrowed from her brother. Afterward she built a dwelling-house on the strip retained, borrowing \$1,500 from a building and loan company, and paying such loan in monthly installments, with money received from her mother, from keeping boarders, and from her brothers. This house is of the value of \$2,500, and is occupied as a home. In 1898 Rosa and her brother, on their own account, and against the advice of Theodore Raben, bought ten acres of land at Mount Vernon for \$1,200. The cash payment was made out of the profits of the beer business. The land was platted as an addition to said city. Rosa subsequently bought her brother's interest for \$1,000, which she paid with money borrowed by herself from the bank, and repaid from the profits of the beer business and the sale of lots. She improved said addition, erecting in all thirteen dwelling-houses, which she sold, doing all the business herself. In 1900 her contract with the American Brewing Company was dissolved, and she made a contract with appellee F. W. Cook Brewing Company, under which she bought and resold beer in the same manner that she had done theretofore. The findings contain a detailed account of her business transactions and of the property acquired, the value of which is \$22,300. No books have been kept between the Rabens.

One finding made by the court is as follows: "That, in the transactions aforesaid, the defendant Rosa Raben has received from the defendant Theodore Raben neither money nor property, but she has received his personal services in the conduct and management of her business affairs, espe-

cially in the purchase and sale of beer under the contracts with the American Brewing Company and the F. W. Cook Brewing Company, and his services have contributed largely to the success of such business. During the operations under these contracts, his services have been of the average value of \$2,500 per annum. The only capital invested in the business was that of the defendant Rosa Raben, and her purpose in entering upon and continuing the business was to make a living for herself and family and to acquire money and property, and the motive of defendant Theodore Raben was to aid and support his wife and family, and to prevent the fruits of his earnings from being diverted from these ends to the payment of his creditors. By reason of increase in values of real estate, and the growth and prosperity of the beer business and the other ventures of the defendant Rosa Raben, her affairs have prospered, and resulted in greater profit than was anticipated by either of the parties, the real estate alone having more than trebled in value since she purchased it. During the transactions herein mentioned, Rosa Raben had knowledge of the insolvency of said Theodore Raben, and of the debts owing by him." A schedule of the debts owing by Theodore Raben is included in the finding. The amount, aggregating \$16,000, being the debts of the two partnerships first referred to.

The disposition of the case, under these facts, depends upon whether the husband had a right to give his services and skill to the wife, as was done. The appellants

1. contend that the surplus of the accumulation over the portion needed for the support of the family may be reached in equity and appropriated to the payment of his debts. The point has been the subject of various decisions. It must be considered here in view of the rights possessed by married women. Section one of the act of 1881 (§7851 Burns 1908, §5115 R. S. 1881) abolished all legal disabilities of married women to make contracts, except as therein otherwise

provided. The act of 1853 (§7852 Burns 1908, §5116 R. S. 1881), provides that "no lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she were unmarried: Provided, that such wife shall have no power to incumber or convey such lands, except by deed in which her husband shall join."

Section two of the act of 1881 (§7853 Burns 1908, §5117 R. S. 1881) is as follows: "A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, together with all her rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: Provided, however, that she shall be bound by an estoppel *in pais*, like any other person." The only limitation upon her power to bind herself is that she shall not become surety. §7855 Burns 1908, §5119 R. S. 1881. A later act put it within her power to limit such exception. Acts 1903, p. 394, §7856 Burns 1908. See *Ludlow v. Colt* (1906), 41 Ind. App. 138.

The wife may in this State enter into a business partnership with her husband. *Anderson v. Citizens Nat. Bank* (1906), 38 Ind. App. 190. She may borrow money

2. from him, and he may have his action against her to recover it. *Townsend v. Huntzinger* (1908), 41 Ind. App. 223; *Harrell v. Harrell* (1889), 117 Ind. 94. He may act as her agent, and bind her by note. *Taylor v. Angel*

(1904), 162 Ind. 670. The agency is governed by the same principles which apply to other agencies. *Runyon v. Snell* (1888), 116 Ind. 164, 9 Am. St. 839.

It is true, of course, that in determining whether fraud exists in a given transaction, the relation is taken into account, but the ancient policy which recognized but one
3. person, and that person the husband, has passed. The wife now is cheerfully accorded rights which would have shocked the consciences of the chancellors who delivered some of the opinions relied upon by the appellant.

The exact question made was decided in this State adversely to appellant's insistence so long ago as 1875, although the writer of the opinion disclaimed such decision. In

4. *Cooper v. Ham* (1875), 49 Ind. 393, the text of Bump, *Fraudulent Conveyances*, p. 269, under which appellant would be entitled to recover, was set out and criticised, and a review of the cases cited in the then current edition of the work made. The facts before the court were, that when the property (a mill) was acquired by the wife the husband was destitute of means. The title was vested in the wife by third parties, so that the same might not be taken for his debts. She then employed him as her agent to operate the mill. The opinion was, in part, as follows: "But it is argued that the fact that George Ham acted as the agent of his wife in the purchase, erection, and operating of the mill, affords very strong if not conclusive evidence that the transaction is fraudulent. The position is wholly unfounded. Mrs. Ham had the undoubted right to employ her husband to act as her agent in operating the mill, and such employment is not proof of an attempt on her part to defraud his creditors. It is equally well settled that she is entitled to the proceeds and profits of the mill. * * * George Ham has the right to give his personal services and skill to the management of his wife's property, without any other compensation than the support and maintenance of himself and family. In the present case, there has been no

accumulation of other property resulting from the profits of the mill, nor has the mill been paid for; but there are debts against it, and liens resting upon it. If these debts are paid, and the liens discharged, the question which is considered in several of the foregoing cases may arise, and that is, whether the husband can, by his labor and skill, add to and increase the separate property of his wife, without giving his creditors the right to have the proceeds and profits apportioned between themselves and the wife. Or if the earnings of the husband should be invested in other property, in the name of his wife, or if there should be money coming to him for his services and skill, which could be reached by a proceeding in attachment or supplementary to execution, the question discussed in many of the above cases would arise; but these questions are not now before us, and we decide nothing in reference thereto." While the court by the last clause quoted professed to restrict its decision, yet it affirmed a judgment for the wife, and the facts did show an accumulation created by the husband's labor and skill, and applied to the satisfaction of a mortgage on said property. It could not possibly be the law that the earnings of the husband belong to his creditors when used to purchase real estate by his wife, and that they belong to the wife when she uses them only to pay mortgages secured upon the same real estate; so that the point now mooted was in fact decided. The distinction between those cases in which an accumulation is held for the husband's debt and those in which no equity exists upon which to base a liability is well expressed by the Wisconsin supreme court in the case of *Mayers v. Kaiser* (1893), 85 Wis. 382, 396, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. 849: "The cases that hold or intimate an opinion that in a court of equity an apportionment of profits or division of property may be had at the suit at the husband's creditors, will be found to rest upon the ground of community or blending of the money or property of the husband, as well as his labor, with the property of the wife in some business venture

or enterprise in which there is a common participation in or use of the profits; and we have met with no case in which the bare fact that the time, skill, and labor of the husband devoted to the business of the wife, has been held to give rise to such an equity."

In the case at bar there is community of neither property nor partnership. There is therefore nothing from which an equity in favor of the husband's creditor against the wife can be deduced. Suppose the insolvent and unsuccessful husband had been employed by some third person at a grossly inadequate salary, and had continued in such employment these years, his employer profiting greatly through the skill and devotion thus purchased. Would anyone suspect that the creditors of the employe could now recover the difference between the wages paid and the profits made? Why should the wife not have an equal right to give her husband employment that a stranger has? It is true that no stipulated wage has been paid by Mrs. Raben, but, at the time the employment began, the support of the family may have been as much more than the market value of the husband's services as it was less later. At any rate, the compensation was a matter to be determined by the parties themselves. Again, reverse conditions: Suppose a woman had acquired insolvency and experience in the millinery trade (as some of them have done), and subsequently found a husband willing to invest his share of his father's estate in a stock of millinery, and wise enough to put the wife in charge, with no other contract than that she should take such money out of the business as she needed, would it be suspected that his competence so acquired could be taken in equity to pay debts contracted by the wife in her own business twenty years earlier? The entire question is whether the property and business in question really belonged to the wife. *Mayers v. Kaiser, supra*. When this fact is found in her favor, as it is in the case under discussion, but one conclusion can follow, as is shown by

many decisions in this State. The husband did not put anything which was subject to sale on execution, or which

5. could be reached by his creditors, into the making of the estate. *Cooper v. Ham, supra*; *Stone v. Brown* (1888), 116 Ind. 78; *McLean v. Hess* (1886), 106 Ind. 555.

In the case of *Stone v. Brown, supra*, where the wife procured title to the lands of the husband encumbered to their full value, paying therefor with money given to her by her father, and money received from the sale of crops thereafter raised on the land by the joint labor of herself and husband, it was held that her title was complete and the husband's creditors not harmed. The court said: "So far as the purchase money was paid from the proceeds of the crops raised on the land after it was conveyed to Mrs. Brown, even though her husband assisted in producing the crops by managing the farm, the payment was nevertheless, in contemplation of law, made by her." See, also, *Scott v. Hudson* (1882), 86 Ind. 286; *Stout v. Perry* (1880), 70 Ind. 501; *Montgomery v. Hickman* (1878), 62 Ind. 598.

A review of cases from other jurisdictions, in which the question involved in this appeal has been discussed or decided, would be unjustifiable, in view of the fact that it could be, at the best, no more than a reproduction of the exhaustive notes to be found in the cases of *Morris v. Fletcher* (1899), 77 Am. St. 87, and *Mayers v. Kaiser* (1893), 21 L. R. A. 623, and at its worst a borrowed synopsis of work accurately done in a more appropriate place.

The case of *Bogges v. Richards's Admr.* (1894), 39 W. Va. 567, 20 S. E. 599, 45 Am. St. 938, 26 L. R. A. 537, is a fair illustration of what the judicial mind can accomplish in reaching a desired result. The facts before the court were extreme, and in their consideration the court seems to make the creditor's equity dependent upon whether the wife's business conducted by the husband results in a surplus over family expenses larger than the chancellor approves. The argu-

ment of expediency made by appellant's counsel is not persuasive at a time when the bankruptcy law furnishes a means of legally attaining a release from debts which the debtor cannot pay.

Judgment affirmed.

**PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. ROGERS, ADMINISTRATRIX.**

[No. 6,529. Filed January 29, 1900. Rehearing denied March 30, 1900. Transfer denied January 28, 1910.]

1. **PLEADING.—Complaint.—Sufficiency at Common Law or by Statute.**—A complaint stating facts sufficient to show a cause of action at the common law or by statute is good on demurrer. p. 236.
2. **PLEADING.—Complaint.—Theory.**—A complaint stating facts sufficient to constitute a cause of action is good, although the pleader misconceived the law giving him his rights. p. 236.
3. **MASTER AND SERVANT.—Railroads.—Violation of Ordinance.—Fellow Servants.**—A complaint alleging that defendant railroad company negligently ran its train through a certain city in violation of a speed ordinance, thereby killing the plaintiff's decedent, who was a section hand, is not sufficient at the common law. p. 236.
4. **MASTER AND SERVANT.—Employers' Liability Act.—Complaint.**—A complaint founded upon section one of the employers' liability act (Acts 1893, p. 204, §1, §8017 Burns 1908) must affirmatively allege facts bringing the plaintiff within such act. p. 239.
5. **PLEADING.—Complaint.—Confusion.—Facts.—Inferences.**—Mere confusion in the statement of facts does not render a complaint bad on demurrer, and such alleged facts carry with them all necessary inferences. p. 239.
6. **MASTER AND SERVANT.—Employers' Liability Act.—Railroads.—Operating Trains.—Line of Duty.—Complaint.**—Since a railroad company can operate trains only by employing servants, an allegation that defendant railroad company negligently ran its train, killing plaintiff's decedent, imports that defendant's servant in charge of the engine and while in the line of his duty, ran such train. p. 239.
7. **MASTER AND SERVANT.—Railroads.—Failure to Ring Bell.—Complaint.**—An allegation that defendant railroad company negligently ran its train against plaintiff's decedent "without giving him warning of approach by sounding the whistle or ringing the

Pittsburgh, etc., R. Co. v. Rogers—45 Ind. App. 230.

- bell," does not show negligence, there being no averment that such company knew or should have known of the decedent's peril. p. 239.
8. MASTER AND SERVANT.—*Railroads.—Violation of Speed Ordinance.—Death.—Proximate Cause.—Complaint.*—A complaint alleging that defendant railroad company negligently ran its train through a city in violation of the speed ordinance thereby killing a section hand who was working on the track, sufficiently shows that the violation of the ordinance was the proximate cause of such killing. p. 240.
9. MASTER AND SERVANT.—*Railroads.—Violation of Ordinance.—Complaint.—Recitals.*—A complaint alleging that defendant railroad company negligently ran its train through a city at the rate of thirty miles per hour "contrary to and in violation of * * * an ordinance * * * of said city * * * which was on said date in full force and effect," sufficiently shows that such ordinance was in force at such time. p. 240.
10. MASTER AND SERVANT.—*Railroads.—Negating Contributory Negligence.—Complaint.*—A complaint alleging that the decedent was struck by one of defendant's trains without negligence on his part, negatives contributory negligence. p. 241.
11. MASTER AND SERVANT.—*Assumption of Risk.—Negating.—Complaint.*—A complaint by the representative of a servant killed by a railroad company must negative the servant's assumption of the risk causing his death. p. 241.
12. MASTER AND SERVANT.—*Assumption of Risk.—Engineers.—Negligence of.*—A section hand does not assume the risk of the negligence of an engineer in running an engine. section one of the employers' liability act (Acts 1893, p. 294, §1, §8017 Burns 1908) placing such burden upon the company. p. 241.
13. MASTER AND SERVANT.—*Employers' Liability Act.—Railroads.—Engineers.—Section Hands.—Violating Ordinance.—Complaint.*—A complaint alleging that defendant railroad company negligently ran its train in violation of a city ordinance, thereby killing one of its section hands, states a cause of action under section one of the employers' liability act (Acts 1893, p. 294, §1, §8017 Burns 1908). p. 242.
14. EVIDENCE.—*Inferences.—Regular Passenger-Train.—Railroads.—Master and Servant.*—Evidence that a regular passenger-train upon defendant's road killed the plaintiff's decedent justifies a jury in inferring that such train belonged to defendant, and that its employees were acting in the line of their duty. p. 242.
15. MASTER AND SERVANT.—*Railroads.—Violation of Ordinance.—Section Hands.—Contributory Negligence.—Question for Jury.*—Whether a section hand who was working on defendant railroad company's track within the corporate limits of a city was guilty

of contributory negligence in failing to see a train approaching at a rate of speed in violation of a city ordinance, and whether he would have been able to avoid injury if the speed of the train had been within the ordinance rate, are questions for the jury. p. 243.

16. EVIDENCE.—*Mortality Tables.—Expectancy.—Master and Servant.*—In an action by the personal representative of a deceased servant for the recovery of damages for such servant's death, tables of mortality are admissible in evidence to show the decedent's expectancy. p. 244.
17. TRIAL.—*Reception of Evidence.—Objections.—Changing of, on Appeal.*—Where a party makes specific objections to the admission of evidence at the trial, he cannot present different reasons therefor on appeal. p. 246.
18. EVIDENCE.—*City Ordinances.—How Proved.*—The introduction of the ordinance record of a city constitutes *prima facie* evidence of the validity of the ordinances therein contained, and unless their proper enactment is questioned no further proof is required. p. 246.
19. TRIAL.—*Instructions.—Correct but Incomplete.*—The giving of an instruction which is correct so far as it goes, but which purports to be, and is, incomplete, is not erroneous. p. 247.
20. MASTER AND SERVANT.—*Burden of Proof.—Contributory Negligence.*—An instruction that the burden is upon the plaintiff to establish the defendant's negligence, and that under a general denial the defendant may prove the servant's contributory negligence, but that the burden of proving contributory negligence is upon the defendant, is correct. p. 247.
21. MASTER AND SERVANT.—*Contributory Negligence.—Effect.—Instructions.*—An instruction that contributory negligence on the part of the servant will preclude a recovery by him though the master was guilty of negligence, is not erroneous. p. 247.
22. MASTER AND SERVANT.—*Contributory Negligence.—Proof of.—Instructions.*—An instruction that the burden is upon the master to prove the servant's contributory negligence and that if the evidence introduced by the servant should show that, by the use of ordinary care, such servant could have avoided the injury, then the servant cannot recover, is favorable to the master. p. 248.
23. MASTER AND SERVANT.—*Railroads.—Violation of Ordinance.—Section Hands.—Injuries.—Instructions.*—An instruction that the ordinance admitted in evidence was in force at the time of decedent's injury, and that if defendant railroad company run its train in violation thereof, thereby killing the decedent who at the time was in the exercise of due care, such company would be liable, is correct. p. 248.
24. MASTER AND SERVANT.—*Railroads.—Ordinances.—Obedience to.—Presumptions.—Contributory Negligence.—Questions for Jury.*—

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Instructions.—An instruction that a section hand had a right to assume that defendant railroad company would obey the speed ordinance of the city wherein he was working and that whether the section hand should have looked and listened for an approaching train is a question for the jury, is correct. p. 248.

25. MASTER AND SERVANT.—*Railroads.—Section Hands.—Engineer's Assumption of Clear Track.—Instructions.*—An instruction that the engineer of a train alleged to have been run through a city in violation of an ordinance, thereby killing a section hand, had a right to assume that such hand would get off the track, is properly refused. p. 249.

26. MASTER AND SERVANT.—*Railroads.—Section Hands.—Contributory Negligence.—Instructions.*—An instruction that if the decedent section hand's view of the track was unobstructed and he failed to see the defendant's train, alleged to have been run at a speed in excess of the city ordinance, in time to get off the track, plaintiff cannot recover, is properly refused. p. 249.

27. MASTER AND SERVANT.—*Railroads.—Section Hands.—Contributory Negligence.—Question for Jury.*—Whether a section hand working upon a railroad track within a city was guilty of contributory negligence in failing to turn around from his work and see an approaching train running in excess of the ordinance rate is a question for the jury. p. 249.

28. APPEAL.—*Fair Trial.*—Where appellant has been given a fair trial and no prejudicial error was committed, the judgment will not be reversed. p. 249.

29. COURTS.—*Jurisdiction.—Constitutional Question.—Transfer.*—The Appellate Court has no jurisdiction over an appeal involving a constitutional question, and where the Supreme Court transfers to the Appellate Court an appeal involving a statute which has been upheld, it will be conclusively presumed that such question is not involved in the case. p. 250.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Action by Alvira Rogers, as administratrix of the estate of Luther Rogers, deceased, against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment on a verdict for plaintiff for \$2,945, defendant appeals. *Affirmed.*

G. E. Ross, for appellant.

Williams & Clawson, Todd & Rauch and *H. N. Hipkind*, for appellee.

RABB, J.—The appellee's decedent was in appellant's serv-

ice as a section-hand, and was killed by being struck by one of the appellant's passenger-trains, while he was engaged at work on the road, in the line of his employment. The accident occurred within the corporate limits of the city of Marion.

This action was brought by appellee, as administratrix of the estate of the decedent, for damages resulting from his death, which it is claimed was the result of the negligence of appellant's servants in charge of its train.

Appellant's demurrer to the complaint for want of facts was overruled; an answer filed; cause submitted to a jury for trial, resulting in a verdict in favor of appellee. Appellant's motions for a new trial, and in arrest of judgment, were overruled, and judgment rendered on the verdict.

The errors assigned in this court call in question the ruling of the court below on the demurrer to the complaint, and on appellant's motions in arrest of judgment and for a new trial.

The substantial averments of the complaint, after the formal allegations with reference to the appointment of plaintiff as administratrix of the estate of the decedent, and the business in which defendant was engaged, are that the plaintiff's decedent was an employe of the defendant, working as a section-hand on defendant's track and road; that with other employes of defendant, engaged in like service, he, on August 6, 1904, was working on defendant's track between Butler and Park avenues in the city of Marion, within the corporate limits of the city; that while so engaged in the performance of said work and labor, and while in the line of his duty as such laborer, and while his attention was fixed thereon and engrossed therein, and without any negligence on his part, the defendant, by its servants and employes, who were at the time engaged in the line of their duties, carelessly and negligently ran and operated a certain fast passenger-train on its said road, from east to west in said city of Marion, Grant county, Indiana, and within the city limits of

said city, and at the place where decedent was at the time engaged in his work, at a great and dangerous rate of speed. to wit, about thirty miles an hour, contrary to and in violation of section one of an ordinance passed and adopted by the common council of said city on June 3, 1891, and which was on said date in full force and effect, and which provided that any "conductor, engineer, or other person having charge of or owning or operating any passenger-train, shall be and are hereby required to run such passenger-train into and within the corporate limits of said city at a rate of speed not to exceed six miles per hour."

Plaintiff avers that, by reason of the violation of said ordinance, and the great rate of speed at which said train was running (at the place where said decedent was engaged at work) on said date, to wit, about thirty miles per hour, plaintiff's decedent was unable to get out of the reach of said train and locomotive; that had said defendant run and operated said train and locomotive engine in compliance with said ordinance, and at the rate of speed not exceeding six miles per hour, plaintiff's decedent could have retreated and escaped injury; that because his attention was so fixed upon his work, and engrossed therein, plaintiff's decedent did not see nor have any knowledge of the approach of said train and locomotive engine until said train and locomotive engine had advanced to such proximity that escape was impossible; that defendant and its employes in charge of said passenger-train and locomotive engine, and in operating them, carelessly and negligently ran said passenger-train and locomotive engine on the track where said decedent was at the time engaged in his work, and did not give said decedent any notice or warning of their approach, either by sounding the whistle or ringing the bell on said locomotive engine, until said locomotive engine was within fifteen feet of plaintiff's decedent, but that said defendant's servants and agents operating said train, so carelessly and negligently ran it upon and against plaintiff's decedent, and defendant's said locomotive

engine struck said plaintiff's decedent with great force and violence, thereby mortally injuring him.

Appellant contends that it is the theory of appellee's case that her complaint is founded upon a common-law liability, and appellant proceeds to argue at length, and to cite a vast array of authorities, to sustain the proposition that a common-law liability is not stated in the complaint, and that as the complaint is not good upon the theory upon which it is predicated appellant's demurrer should have been sustained.

A complaint which states facts enough to authorize a recovery in favor of a plaintiff under the law, whether statutory or common law, is sufficient to withstand a de-

1. murrer. It is true the complaint must proceed upon some definite theory; but the phrase "theory of the case" does not mean what may have been in the mind
2. of the pleader as to the source of his legal rights, but means the basis upon which the pleading proceeds, the facts upon which a right of action is claimed to exist in favor of the party asserting them. If the facts stated in the pleading, and upon which the plaintiff predicates a right to recover, are sufficient to authorize such recovery, either at the common law or by virtue of the provisions of some statute, his complaint will withstand a demurrer, although the pleader himself may have misconceived the law awarding him the right.

In this case it is manifest that no cause of action is stated in the appellee's complaint at common law. It is not insisted by appellee that the complaint states a common-

3. law action in her favor; but it is contended that the facts stated in the complaint show a right of recovery in her favor under and by virtue of the provisions of §8017 Burns 1908, Acts 1893, p. 294, §1, providing that "every railroad, * * * operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

* * * Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway.”

Appellant insists that the complaint is insufficient to make a case under this statute, for the following reasons: (1) That the averments of the complaint fail to show that the negligence charged was the proximate cause of the injury to appellee's decedent; (2) that the negligence charged is not shown by direct averment to have been the negligence of a servant engaged in the line of his duties, who was at the time “in charge of” appellant's locomotive or train of cars; (3) that the complaint fails affirmatively to show that the risk of the injury the decedent received was not one of the assumed risks of the service; (4) that it fails to show that the decedent might not, by the exercise of his senses, have known of the approach of the train that struck him, in time to avoid the injury; (5) that, so far as the complaint is founded upon negligence in running the train in violation of the speed ordinance, it is not shown by direct averment that there was any such ordinance in force at the time; (6) that the attempted charge of negligence on the part of the engineer, in failing to sound his whistle or ring the bell on approaching the decedent, is insufficient, for the reason that it is not shown by the averments of the complaint that the engineer knew of the situation of the decedent, or could have known it by the exercise of due care; (7) that the facts stated fail to show a duty owing by the appellant to the decedent, and affirmatively show contributory negligence on the part of the decedent.

The complaint is far from being a model in clearness of expression, but it does affirmatively and by direct averments show that the appellee's decedent was a section laborer in the employ of the appellant; that appellant's passenger-train was run within the corporate limits of the city of Marion by its servants, while in the line of their employ-

ment, at the rate of thirty miles an hour, and that while it was so being run within the corporate limits of said city, and without any negligence upon the part of the decedent, and while he was engaged in the line of his duty under his employment, at work upon appellant's track at a point within said city, with his attention fixed upon his work, said train struck and killed him; that, by reason of the great rate of speed at which the train was being run, the decedent was unable to get out of reach thereof, and that had the train been run at a speed not exceeding six miles an hour the decedent could have retreated and escaped injury; that the decedent did not see nor have knowledge of the engine until it had advanced to such proximity that escape was impossible; that the employes in charge of said train and locomotive engine, and in operating them, did not give the decedent any notice or warning of their approach by sounding the whistle or ringing the bell, until the engine was within fifteen feet of the plaintiff's decedent, "but that said defendant's servants and agents operating said train, so carelessly and negligently ran it upon and against decedent that the locomotive engine struck the plaintiff's decedent, thereby mortally injuring him."

With reference to the city ordinance, the complaint avers that appellant's train was run through the city at the rate of about thirty miles an hour, "contrary to and in violation of section one of an ordinance passed and adopted by the common council of said city on June 3, 1891, and which was on said date in full force and effect, and which provided that 'any conductor, engineer or other person having charge of or owning or operating any passenger-train, shall be and are hereby required to run such passenger-train into and within the corporate limits of said city at a rate of speed not to exceed six miles per hour.' "

It is necessary, in making out a case against a railroad company under the employers' liability act for the negli-

gence of a person in charge of a locomotive engine or
 4. train of cars, that it shall appear from the averments of the complaint that the case is within the statute, and that the negligence complained of as having produced the injury was the negligence of a servant of the company, who, in the line of his employment, had charge of a locomotive or train of cars.

There is some confusion in the averments of this complaint upon that score, and they might have been made more clear, definite and certain, and it is inexcusable upon the
 5. part of those who draft pleadings that there should be obscurity in reference to averments of this character. But mere confusion of statement is not a sufficient ground of demurrer. Pleadings are to be liberally construed. Necessary facts are to be directly averred. But the facts averred in a complaint carry with them all necessary inferences.

The appellant in this case is a corporation. It acts only by its servants. It could run a locomotive and train of cars only by the hand of its servants. The servant operating one of its engines would necessarily be a
 6. person in charge of the engine, within the meaning of the law in question, and the averment in the complaint that the "defendant, by its servants, ran its train," etc., means precisely the same thing as the averment that the servant of the defendant, in charge of its train and engine, did the same things that it is averred in the complaint the defendant did through its servants. These averments in the complaint carry the necessary inference that the train which struck appellee's decedent was in charge of the appellant's servants, and it is directly averred in the complaint that the "defendant's employe in charge of
 7. its passenger-train and locomotive engine, carelessly and negligently ran them against the plaintiff's decedent, without giving him warning of approach by sounding the whistle or ringing the bell," which, we agree with

appellant, are not sufficient to show negligence on the part of such employes in so failing to sound the whistle, for the reason that it is not shown by any proper averment in the complaint that such persons in charge of the locomotive engine and train either knew of the decedent's peril, or, by the exercise of ordinary care, could have known of his situation; yet they show clearly that it was the negligence of the servant in charge of appellant's locomotive engine and train of cars upon which appellee was predicated her right of action, and in this respect the averments of the complaint were sufficient to make out appellee's case under the statute.

The negligent act of the servant relied upon in the complaint is that of running the engine and train of cars in violation of the speed ordinance of the city of Marion.

8. This ordinance required that those in charge of passenger-trains should not run them through the corporate limits of the city of Marion at a speed exceeding six miles an hour. The complaint avers that appellant's servants were running the train, which struck and killed appellee's decedent, at the rate of thirty miles an hour, and that it was on account of the high rate of speed at which the train was running that the decedent was prevented from escaping from the track; that had the train been run at the rate of six miles an hour he would have been able to get out of its reach. We think that these allegations show that the negligence charged was the proximate cause of the injury.

It is contended that it does not appear by direct averment that there was a speed ordinance, limiting the rate of speed at which trains might run through the city of Marion,

9. in force at the time the accident occurred; that what does appear in the complaint on that subject is merely by way of recital. We cannot agree with this contention. It is true that, after the averments in the complaint regarding the rate of speed at which the train was running, the

words, "contrary to and in violation of section one of an ordinance passed and adopted by the common council of said city on June 3, 1891," do appear in the complaint as a recital, but this recital is immediately and in the same connection followed by the direct averment that the recited ordinance was in force and effect at the time, and the ordinance is set out; and we think it thus sufficiently appears by direct averment that the speed ordinance was in force at the time of the accident.

There is also the direct averment in the complaint that the decedent was struck by one of appellant's trains, without negligence on his part. It is thus sufficiently shown

10. that the decedent's negligence did not proximately contribute to his injury.

Appellant, with apparent earnestness, insists that the complaint is insufficient for failing affirmatively to show that the decedent's injury and death did not result from

11. an assumed risk of his employment, and that in actions of this character this fact must appear from the averments of the complaint. We agree with appellant that this fact must affirmatively appear from the averments of the complaint, but we do not agree that the complaint fails to show this fact.

Prior to the enactment of the employers' liability act, section-men working upon railroad tracks, and other employes of railroad companies working around their

12. tracks, assumed, as a part of the risks of their employment, the dangers and risks that would arise from the negligence of engineers and others in charge of running trains; but the employers' liability act relieved such employes of these assumed risks, and placed the burden of them upon the employer, and the facts stated in the complaint show that the injury the decedent received was not from one of the assumed risks of his employment, but from a risk which the statute thus transferred from the employe to the

employer. The facts stated also show the duty the appellant owed to the decedent. It shows that the decedent was

13. appellant's servant, engaged, at the time he was killed, in the duties of his employment, and the employers' liability act, having imposed upon the company all the duties and obligations which those in charge of its engines and trains would owe to their coëmployees working on and around appellant's tracks, and imputing to the company the negligence of such servants in charge of such locomotive and train, the complaint sufficiently shows a duty owing to the decedent by the appellant, and the breach of that duty resulting in the servant's death. The running of the train in violation of the speed ordinance of the city was an act of negligence, and of this speed ordinance the servants of appellant were entitled to the benefit. *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247, and cases cited.

We think the complaint sufficient to withstand a demurrer, and no error intervened in overruling the demurrer thereto.

The appellant's reasons for a new trial, urged here for reversal, are, that the evidence is not sufficient to sustain the verdict, and that the court erred in the admission of certain evidence and in giving and refusing to give certain instructions.

It is first claimed that the evidence fails to show that appellant's employes had charge of the locomotive that struck the decedent. The evidence shows that the train

14. that struck and killed appellee's decedent was a regular passenger-train on appellant's road. From this circumstance the jury was justified in inferring that such train was in charge of the servants of the appellant, and that in running and operating it they were engaged in the performance of the duties of their employment. These facts do not have to be made out by direct testimony, nor proved beyond a reasonable doubt. Any reasonable man would infer that a passenger-train running over a partic-

ular railroad belonged to the company owning the road, and that the men engaged in operating the train were the servants of the company, and that they were, in operating the train, engaged in the line of the duties of their employment.

Appellant earnestly insists that the evidence fails to warrant the conclusion that the accident would not have happened precisely as it did had the train been running

15. at the rate of six miles an hour, and did not show that it was by reason of the rate of speed at which the train was running that the accident happened. The evidence warranted the assumption that if the train had been running at six miles an hour instead of thirty the decedent would have escaped injury. Because the train was running at the rate of thirty miles an hour, the decedent had less than a half second's time to escape from the track after, as averred in the complaint and shown by the evidence, he became aware of the approach of the train. If it had been running at the rate of six miles an hour he would have had five times that length of time to escape after the warning whistle was sounded, and he knew the train was upon him. The jury were fully warranted in finding that he could not escape the injury in the one case, and that he could have escaped it in the other. And whether the decedent was guilty of negligence in failing to see or hear the train in time to escape, under the facts disclosed, was properly a question for the jury. While it is true that it is the duty of those who work along a railroad track to exercise reasonable vigilance to avoid injury from passing trains, yet they are not required to keep a constant watch for passing trains, nor are they negligent if they fail to see one that, by turning their attention from their work, they might see and avoid. The same rule does not apply to trackmen working upon railroads that applies to travelers upon a public highway. The laborer upon the track is required and expected to devote his time and attention to the duties of his employ-

ment, and it is only such vigilance as he can reasonably exercise in connection with the performance of his work that is required of him to exonerate him from the charge of negligence.

In this case the evidence discloses that the train that struck and killed the decedent might have been seen, by one whose eyes were turned in its direction, for the distance of one-half mile from the place where the accident occurred. The train would cover this distance, at the rate at which it was running, in one minute. The decedent's work was filling in the track and dressing it down. His face and attention were turned in the opposite direction from which the train was coming. He could not see in both directions at the same time, and we cannot say, as a matter of law, that due care required that he should turn from his work every half-minute to see if a train was coming from the opposite direction.

One of the reasons set forth in appellant's motion for a new trial was the admission in evidence of life tables showing the decedent's expectancy of life at the time of 16. his death. This evidence was competent. *Louisville, etc., R. Co. v. Miller* (1895), 141 Ind. 533, 562; *Clark County Cement Co. v. Wright* (1897), 16 Ind. App. 630; *Shover v. Myrick* (1892), 4 Ind. App. 7; *Smiser v. State, ex rel.* (1897), 17 Ind. App. 519; *Crosby v. Pierce* (1900), 25 Ind. App. 108.

Appellant insists that reversible error intervened in the court's admitting in evidence, over its objection, the speed ordinance of the city of Marion. The record discloses that the appellee offered in evidence the ordinance record of the city of Marion, containing the first section of the ordinance in question. This was objected to, on the ground that "if any part of the ordinance goes in evidence the entire ordinance should go in; that the ordinance itself is shown to be penal and cannot be made a basis of a civil action; that it is not properly authenticated, and that it does not tend to prove any issue in this case; that the defendant company is

not answerable for its violation to one of its employes by another employe in its service; that the violation by one employe cannot be made the basis of an action for damages to another."

This objection was overruled, and the first section admitted in evidence. Subsequently the record of the entire ordinance was offered in evidence, to which appellant objected, on the ground "that it is not properly authenticated; that it does not tend to prove any issue in the cause; that it is not binding upon the defendant with reference to its own employes, and has no application to the operation of its trains with reference to its own employes; that it is penal in its character, and provides for a penalty for its violation, and cannot be made the basis of a civil action, especially to hold the defendant company liable for the acts of one of its servants in violating the ordinance resulting in injury to another." This objection was overruled, and the record read in evidence:

It is now in this court insisted that the evidence was incompetent, for the reason that it was not shown that the ordinance had been published, as required in its provisions.

Section 8654 Burns 1908, Acts 1905, p. 219, §52, which was in force at the time the accident occurred, provides that every city ordinance, imposing a penalty or forfeiture for the violation thereof, shall, before the same shall take effect, be published once each week for two consecutive weeks in a newspaper of general circulation printed in such city. This section further provides that all ordinances shall, within a reasonable time after their approval by the mayor, be recorded in a book kept for that purpose by the city clerk, which shall include the signature of the presiding officer and be attested by the clerk, and such record or a certified copy thereof "shall be presumptive evidence of the passage and going into effect of such ordinance."

There are two grounds upon which we think the ruling of the court below may properly be sustained: (1) Where ten-

dered evidence is objected to, the objecting party must point out the specific objections to the offered evidence, and if the evidence be admitted it will be considered as admitted without objection, except as to the matters specifically pointed out to the court by the objecting party. In this case, it was not objected in the court below that the evidence offered was not properly admissible because it was not shown that the ordinance had been published, and, so far as that particular objection is concerned, the question will be treated in this court as though the ordinance was admitted without objection. The objections that were pointed out in the court below were not well taken.

(2) In the case of *Lake Erie, etc., R. Co. v. Brafford* (1896), 15 Ind. App. 655, 666, this court quotes with approval from the decision of the supreme court of

18. Kansas in the case of *Prell v. McDonald* (1871), 7

Kan. 426, 12 Am. Rep. 423: "We think it was unnecessary to go into the proof of all the preliminary steps in passing and publishing said ordinance. The book itself of the ordinances was *prima facie* evidence of the validity of the ordinance. If anything essential to its validity was omitted in passing or publishing it, it then devolved upon the plaintiff to show such invalidity." This further quotation is made in the same case from the case of *City of Atchison v. King* (1872), 9 Kan. 550: "It was the duty of the city authorities to publish the ordinance. As they acted on it, the presumption is that it was duly published; and, at least, this presumption is sufficient until the contrary appears." Iowa authorities are quoted in the same case, that hold that where the ordinance book is introduced without objection, it is to be considered as *prima facie* valid and in force. *State v. King* (1873), 37 Iowa 462; *Larkin v. Burlington, etc., R. Co.* (1892), 85 Iowa 492, 52 N. W. 480.

The case of *Lake Erie, etc., R. Co. v. Brafford, supra*, holds that where the evidence is silent as to whether there was due

publication of a city ordinance that has been duly passed, the presumptions are in favor of the validity and effectiveness of the ordinance.

Here the record presents the question precisely the same as though no objection to the validity of the ordinance had been made in the court below, and the question is practically the same here that was presented to this court in the case cited. For that reason the objection was properly overruled. Under the statute quoted the ordinance record furnished presumptive evidence of the due publication of the ordinance, and cast upon appellant the burden of showing that the ordinance, thus appearing duly of record, was invalid.

It is insisted that the court erred in giving instructions four, five, six, ten and eleven, on its own motion, and four and five asked for by appellee, and in refusing to give instructions four, seven and nine, tendered by appellant.

Instruction four, given by the court on its own motion, was a simple and correct definition of what is meant by the phrase "preponderance of evidence." Instruction

19. five is an incomplete statement of the charge of negligence made by the appellee in her complaint, correct as far as it went, but in which the court did not undertake to state the issues, and was not in any respect erroneous.

Instruction six tells the jury that by the answer of 20. denial the burden is placed on the plaintiff of establishing negligence on the part of the defendant, and that under this issue the defendant may prove contributory negligence on the part of the decedent, but that the burden of proving contributory negligence is on defendant. This instruction was absolutely correct and fair to both parties.

Instruction seven informed the jury that even though the evidence established every material allegation of the complaint, the plaintiff could not recover if the evi-

21. dence disclosed contributory negligence on the part of the decedent, and is subject to no just criticism, especially from the appellant.

Instruction ten correctly informed the jury that while the burden of proof is on the defendant to show the decedent guilty of contributory negligence, it is not required to

22. be done by its own evidence, and that if the evidence introduced by the plaintiff should show that the decedent might, by the use of ordinary care and diligence, have avoided the injury, then in such case he was guilty of contributory negligence, which would prevent a recovery. It is difficult to conceive, and we are unable to understand, that this instruction could be otherwise than beneficial to the appellant.

Instruction eleven told the jury that the ordinance in question was in force at the time the accident happened, and that if the appellant was at the time running its train at

23. a greater rate of speed than the ordinance allowed it was guilty of negligence, and if it thereby caused the death of appellee's decedent, and he at the time was exercising ordinary care, the company would be liable.

The ordinance having been duly passed, duly signed and attested, and duly recorded in the ordinance record, and there having been no evidence impeaching its validity, it was to be presumed, as a matter of law, that it was in force, and the court was justified in so instructing the jury.

Instruction four, asked for by appellee, informed the jury that appellee's decedent had the right to assume that the appellant in the movement of its trains would be con-

24. trolled by the ordinance, and that whether decedent's failure to look and listen for approaching trains under the circumstances was negligence on his part, was for the jury to determine. We think no error intervened in giving this instruction.

Instruction five, given at the request of appellee, was the same in substance as instruction eleven, given by the court on its own motion.

Instruction four, asked for by appellant and refused by the court, was to the effect that appellant's servants, in

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charge of the locomotive and train, had a right to assume that the decedent would get off the track. This instruction was properly refused. In this case it was not a question of what those in charge of appellant's train might or might not assume regarding the action of the decedent. The act they are charged with having done negligently was running the train in violation of the speed ordinance, and their opinion as to what the decedent would or would not do, with reference to getting out of the way of the train, would not afford an excuse for the negligence charged.

Instruction seven, refused by the court, was as follows: "If you find from a preponderance of the evidence that the view was unobstructed, so that the decedent could have seen the train that struck him in time to avoid being struck and injured, and that he failed to look out for his safety, then I charge you that plaintiff cannot recover in this action." This instruction was properly refused. The evidence clearly showed that the unfortunate victim of the accident did not have "a view" of the train that struck him until it was upon him, and the instant he was struck. Whether it was his duty to divert his eyes and attention from his work, and turn around and look in the opposite direction every half minute, to observe whether a train was coming, we think was properly submitted by the court to the jury.

Instruction nine, asked for by appellant and refused, informed the jury that inasmuch as there was no proof of the publication of the notice of the ordinance, the ordinance was therefore not in force. This, as we have already indicated, was properly refused.

The issues in this case were fairly and clearly presented to the jury by clear and explicit instructions of the able judge who presided at the trial. We think no error prejudicial to the appellant has intervened in the trial of this case.

Appellant presents an argument against the constitutionality of the employers' liability act, involved in this case.

This court has no jurisdiction to pass upon the question so discussed. The constitutionality of the law has been upheld by the Supreme Court in the cases of *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247; *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. 438, and this case having been transferred from the Supreme Court to this court (*Pittsburgh, etc., R. Co. v. Rogers* [1907], 168 Ind. 483) it is conclusively presumed that the question discussed is not involved in this case.

Judgment affirmed.

MAYER v. C. P. LESH PAPER COMPANY.

[No. 6,844. Filed November 10, 1900. Rehearing denied January 28, 1910.]

1. TRIAL.—*Special Findings.—Omissions.—Burden of Proof.*—The plaintiff has the burden of proving the allegations of his complaint, and if the special findings fail to set out the facts necessary to a recovery by the plaintiff, the defendant is entitled to judgment. p. 251.
2. ADVERSE POSSESSION.—*Basis of.*—Title by adverse possession imports no merit in the possessor, but demerit in the rightful claimant for dereliction of duty in asserting his claim. p. 253.
3. BOUNDARIES.—*Location.—Special Findings.*—Special findings that a purchaser "supposed the fence was on the line" and that such purchaser intended to claim such fence adversely to the adjoining proprietor, do not show that such fence was the boundary line. p. 253.
4. VENDOR AND PURCHASER.—*Sales of Lot Covered by Portion of Building.—Easement.—Special Findings.*—Special findings showing that a vendor sold a lot of ground upon which a portion of a house was situated, are not sufficient to warrant a conclusion of law that the purchaser took the lot subject to a reservation of the right to continue the use thereof by such owner of the house, there being nothing to show the character or condition of the house. p. 253.
5. TRIAL.—*Special Findings.—Evidentiary Facts.—When Sufficient.*—Where the findings set out evidentiary facts admitting of but

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one conclusion as to the ultimate fact to be proved, such fact will be considered as proved, but if doubt exists as to the proper inference, the party upon whom the burden of proving such fact rests, will fail. p. 255.

6. ADVERSE POSSESSION.—*Special Findings.—Omissions.*—Where plaintiff relies for title upon adverse possession, and special findings fail to show such possession, he cannot recover. p. 255.

From Superior Court of Marion County (71,836); *Vinson Carter*, Judge.

Suit by Leopold Mayer against the C. P. Lesh Paper Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

W. P. Herod, for appellant.

Clifford & Moffett and *William L. Taylor*, for appellee.

ROBY, P. J.—Suit for an injunction to restrain appellee from tearing down a fence and cutting off the corners of two buildings, and for damages. An answer of general denial was filed to the two paragraphs of complaint. A special finding of facts was made and conclusions of law stated thereon in the defendant's favor. A motion for a new trial was overruled, and this appeal is taken from a judgment following the conclusions. The evidence is not in the record, and the correctness of the conclusions of law upon the facts found is the only question for decision. The appellant was the plaintiff. Had no evidence been introduced he

1. would have failed. The burden of proof was therefore upon him, and in order that he may have conclusions in his favor, the special verdict must contain findings upon which they can rest.

The special findings cover approximately nine typewritten pages of the record. The controversy relates to the location of the boundary between lots four and five in block seventy-three in the city of Indianapolis, which covers the triangle formed by Kentucky avenue, Capitol avenue and Georgia street. The court finds, among other things, that there are *now* no monuments existing for fixing the corners of the

original survey of said square. The finding does not show any special survey of said square. It does show that in July, 1906, the appellee, after purchasing lot four therein, procured surveys of said lot by two different persons; that the survey made by one of said persons found a surplus on Kentucky avenue of two and seventy-five one-hundredths feet and a surplus on Georgia street of one and fifty-four one-hundredths feet; that the other surveyor found a surplus on Kentucky avenue of one and sixteen one-hundredths feet and on Georgia street of ninety-five one-hundredths of a foot, and a surplus on Capitol avenue of two inches. It is also found that two competent civil engineers, appointed by the court to make a survey of the lot in controversy, found a surplus on Georgia street of one foot, three and three-quarter inches, and on Kentucky avenue of one foot and nine and one-quarter inches; that lot five was improved by having houses thereon, fronting on both Kentucky avenue and Georgia street; that said buildings were erected on said lots prior to 1863, and that prior to 1860 a fence was erected between the houses that had theretofore been erected on lots four and five, fronting on Georgia street. The finding does not show by whom said fence was erected, but that it extended north a distance of seventy-four feet, nine inches; that it had been from time to time repaired by the owner of that part of lot five, west of said fence; that said fence had, either in whole or in part, been rebuilt since its first erection; that in each instance of rebuilding it was rebuilt as near as practicable upon the same line on which the original fence was located; that it is only partly remaining, a portion of each end being gone; that as it now stands and as originally erected its south end was a distance of seven inches and its north end a distance of thirteen and one-half inches east "of the line dividing said lots."

The wisdom of the law as conclusively settled in this State is exemplified by the facts disclosed in this controversy.

Here is a tract of land of small dimensions, the monuments for fixing the corners of which no longer exist.

Three separate unofficial surveys produce different results. Boundaries fixed by adverse and continued possession for twenty years are at least capable of definite ascertainment. The doctrine is stated in the case of *Sailor v. Hertzog* (1845), 2 Pa. St. 182, and quoted with approval in 3 Washburn, Real Prop. (5th ed.), *499, as follows: "The statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it." And see *Webb v. Rhodes* (1902), 28 Ind. App. 393.

Appellant contends that he is entitled to a conclusion of law in his favor as to the land west of the fence on the south end of the line in dispute. He supports this claim by

3. reference to the case of *Richwine v. Presbyterian Church* (1893), 135 Ind. 80, overlooking the fact that what was there said was said in the consideration of evidence. It might be that the evidentiary facts stated would have justified a finding by the court in his favor, but no such finding was made, and it cannot be said from a finding that "she supposed the fence was on the line," and that she intended to claim such fence adversely to the adjoining proprietor. Many facts might exist showing a contrary intention. The finding is therefore insufficient to warrant a conclusion of law for appellant as to this part of the case. *Webb v. Rhodes, supra*.

A further question is presented as to the north part of said line. It is found that, from 1860 until her death in 1889,

Mary Gulliver and her husband and grantor were the
4. owners of lot four and the north part of lot five:
that prior to 1862 she or her husband erected a dwelling-house on lot five fronting Kentucky avenue, occupying it until her death in 1889; that after that time her administrator sold lot four to appellee's grantor; that after-

ward said administrator sold the adjoining part of lot five to the plaintiff's grantor; that the house has remained in the same place for thirty-five years; that appellee proceeded to cut off so much of it as it claimed was on the east side of the boundary line. Appellant invokes the doctrine stated as follows: "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use." *John Hancock Mut. Life Ins. Co. v. Patterson* (1885), 103 Ind. 582, 586, 53 Am. Rep. 550. See, also, *Allen v. Kersey* (1885), 104 Ind. 1, 4; *Lammott v. Ewers* (1886), 106 Ind. 311, 315; *Ellis v. Bassett* (1891), 128 Ind. 118, 120, 25 Am. St. 421; *Steinke v. Bentley* (1893), 6 Ind. App. 663, 670.

Had the common owner first sold that part of lot five upon which the dwelling-house stood, the purchaser thereof would have, as against him and his subsequent grantees, a much stronger claim than exists. "There is a difference in the authorities as to just how far this rule ought to be extended in favor of a grantor who has failed expressly to reserve any rights in his deed." *Steinke v. Bentley, supra*. "The application of the rule must depend upon the nature, arrangement and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use and the reasonable intendment of the parties; the underlying principle in such cases being that, included in the grant of the principal, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition to which it is enjoyed by the grantor, unless the contrary

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is provided." *John Hancock Mut. Life Ins. Co. v. Patterson, supra*. The mere fact that a house thirty-five years old was in part upon land conveyed by the owner comes very far short of the condition required for the application of the doctrine relied upon. The building may be of inconsiderable value and its replacement by a modern structure may have been in the contemplation of both parties to the sale. The building is not described, and the necessity for its protection to secure the fair enjoyment of the premises is not shown. The verdict does not bring the facts within the law relied upon, and the judgment is therefore affirmed.

ON PETITION FOR REHEARING.

ROBY, J.—Where evidentiary facts stated in a special finding are such that but one inference can be drawn from them, the absence of the statement of the ultimate fact will

5. not prevent the court from drawing the unavoidable inference; but when such evidentiary facts leave room for difference of reasonable opinion, the party having the burden of proof must fail. *Indiana Trust Co. v. Byram* (1905), 36 Ind. App. 6.

The findings in this case do not show an adverse possession. The decision in this case is that the special findings do not show an adverse holding for twenty years. Had the

6. court stated such ultimate fact, an altogether different aspect would be given to the finding. *Webb v. Rhodes* (1902), 28 Ind. App. 393.

The petition for rehearing is overruled.

CITY OF INDIANAPOLIS v. MARTIN.

[No. 6,807. Filed November 5, 1909. Rehearing denied January 28, 1910.]

1. MUNICIPAL CORPORATIONS.—*Ordinances.—Repeal by Implication.*—The repeal by implication of one city ordinance by another is effected only where the repugnancy between such ordinances is so clear that they cannot be reconciled. p. 257.
2. MUNICIPAL CORPORATIONS.—*Ordinances.—Repeal.—City Hospitals.—Superintendents.—Salaries.*—An ordinance creating the office of superintendent of the city hospital for contagious diseases, and fixing the salary of such superintendent, is not repealed by an ordinance whose title relates to certain offices and whose subject-matter is not the same as that of the former. p. 257.
3. MUNICIPAL CORPORATIONS.—*Superintendent of Contagious Hospital.—Salary.—Failure to appropriate for.—Contracts.*—The city's failure to appropriate money for the payment of the salary of the superintendent of its hospital for contagious diseases does not prevent his recovery thereof on the ground that an ordinance provides that "no executive department, officer or employe thereof shall have the power to bind such city to any contract, agreement, or in any other way" beyond the money appropriated for such purpose, since such salary does not rest on a contract. p. 257.

From Superior Court of Marion County (70,605); *James M. Leathers*, Judge.

Action by Paul F. Martin against the City of Indianapolis. From a judgment for plaintiff, defendant appeals. *Affirmed.*

F. E. Matson and *C. D. Bowen*, for appellant.

Charles O. Roemler and *Harry O. Chamberlain*, for appellee.

ROBY, P. J.—This is an action by appellee to recover salary for 1903, 1904 and 1905 for services as physician for a hospital for contagious diseases maintained by the city of Indianapolis. Judgment was rendered for \$1,017.81. The claim is based upon an ordinance of July 7, 1873, which provides that the management of said institution shall be vested in the board of directors of the city hospital, who shall place

the hospital in the charge of a skilful and competent physician, being the same as that by them chosen as superintendent of the city hospital, and that such physician shall receive for his services, as physician of such hospital for contagious diseases, a salary of \$500 per annum, to be paid as the salaries of other city officers are paid.

The appellee brings himself within the provision of this ordinance. Appellant, however, claims that the ordinance was repealed by the fee and salary ordinance of 1904,

1. in which the hospital for contagious diseases was not mentioned. "As repeals by implication are not favored, the repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they cannot be reconciled, in order to make the latter operate as a repeal of the former. This rule is the result of a long course of decisions." *State, ex rel., v. Dudley* (1853), 1 Ohio St. 437. See, also, *Chamberlain v. City of Evansville* (1881), 77 Ind. 542, 544; *Pittsburgh, etc., R. Co. v. Peck* (1909), 172 Ind. 562. The latter ordinance is shown by its title to

2. relate to certain offices. Its subject-matter is not the same as the ordinance of 1873, and they are therefore not inconsistent, and must both be regarded as in effect. *Carver v. Smith* (1883), 90 Ind. 222, 226, 46 Am. Rep. 210; *Robinson v. Rippey* (1887), 111 Ind. 112, 116.

The point most urgently pressed by the city is based upon a provision of the city charter then in force, in terms as follows: "No executive department, officer or employee

3. thereof, shall have the power to bind such city to any contract, agreement, or in any other way to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void." Acts 1903, p. 356.

It is claimed that the evidence fails to show an appropriation for the years named, and that whatever unexpended appropriation was made has been covered back into the treasury. The policy of restrictive laws of the nature of this one is well known. It is the basis of the county reform law (§§5932, 5933 Burns 1908, Acts 1899, p. 343, §§15, 16), and is designed to protect the public from improvident contracts and expenditures. *Turner v. Board, etc.* (1902), 158 Ind. 166; *Board, etc., v. Mowbray* (1903), 160 Ind. 10; *Board, etc., v. Pollard* (1899), 153 Ind. 371; *State, ex rel., v. Parks* (1907), 169 Ind. 93; *State, ex rel., v. Board, etc.* (1905), 165 Ind. 262; *Board, etc., v. Hunter* (1903), 161 Ind. 478; *Gish v. Board, etc.* (1903), 31 Ind. App. 485; *Board, etc., v. Babcock* (1904), 33 Ind. App. 349; *Talbott v. Board, etc.* (1908), 42 Ind. App. 198.

The ordinance under consideration is not inclusive, as are the statutes considered in the cases just cited. The restriction is expressly limited to the making of contracts, express or implied. The power of its officers to incur obligations in excess of the appropriation is denied. To a case coming within its terms, the authorities cited by appellant would be applicable, but the right to the salary of a public officer does not rest in contract. "A public officer is entitled to the salary provided by law, because the law attaches the salary to the office as an incident thereto, and not by force of contract." *Board, etc., v. Chapman* (1899), 22 Ind. App. 60. See, also, *City of Brazil v. McBride* (1879), 69 Ind. 244, 256; *Hall v. Wisconsin* (1880), 103 U. S. 5, 26 L. Ed. 302; *City Council, etc., v. Sweeney* (1871), 44 Ga. 463, 9 Am. Rep. 172; *Mechem, Public Officers*, §5.

The appellee is entitled to the compensation attached to the office by the ordinance of 1873, and not because of any contract, express or implied, made by any executive department officer or employe.

Judgment affirmed.

FOOR ET AL. v. EDWARDS ET AL.

[No. 6,965. Filed February 2, 1910.]

1. NUISANCE.—*Definition*.—Whatever is injurious to health, indecent, offensive, or such an obstruction to property as essentially interferes with the comfortable enjoyment of life or property, is a nuisance. p. 260.
2. NUISANCE.—*Skating-Rinks*.—A skating-rink is not a nuisance *per se*, but whenever it is so conducted as to interfere with the use and enjoyment of another's property, it becomes a nuisance. p. 261.
3. NUISANCE.—*Skating-Rink*.—*Abatement*.—*Complaint*.—A complaint alleging that defendants maintain a skating-rink over plaintiffs' store and that the operation of such rink is driving away the plaintiffs' customers and will destroy their business, is sufficient; and it is not necessary to set out the names of such customers. p. 261.
4. DAMAGES.—*Injunction*.—*Adequate Remedy*.—*Nuisance*.—*Skating-Rink*.—A judgment for damages is not adequate relief, where defendants are operating a skating-rink, thereby driving away plaintiffs' customers. p. 261.

From Putnam Circuit Court; *Benjamin F. Corwin*, Special Judge.

Suit by John T. Edwards and another against Frank E. Foor and others. From a decree for plaintiffs, defendants appeal. *Affirmed*.

W. D. Headrick, C. A. Tevebaugh, C. C. Gillen and G. M. Wilson, for appellants.

S. A. Hays, for appellees.

ROBY, J.—This was a suit by appellees. The complaint was in one paragraph. The appellants demurred thereto. Their demurrers were overruled and exceptions reserved. Appellants refused to plead further, and a decree was entered against them. The substance of the complaint is that the plaintiffs, doing business under a firm name, are and have been for several years engaged in the retail clothing, furnishing and shoe business in the town of Roachdale, Putnam county; that their place of business is on the first floor of a certain building held by them, under a parol lease from one

of the defendants, from year to year, with the privilege of keeping the same as long as they desire; that the second story of said building is in one large room extending over the full length and width of the room occupied by the plaintiffs; that the defendants have recently caused and permitted said room, known as a hall, to be occupied and used as a skating-rink by the defendants Foor, Woodbury and Miller, who are and have been since January 3, 1908, conducting a roller skating-rink therein during day and evening, while the plaintiffs are trying to carry on their said business.

Facts are stated showing that said skating-rink is productive of much noise, which prevents the carrying on of conversation in the storeroom and annoys and discommodes plaintiffs' customers, and drives them away, thereby injuring their business, reducing their profits, and causing them great injury which cannot be compensated in damages; that the noise from said skating-rink is so loud and disagreeable as to render plaintiffs' room unfit for use, and such use, if permitted to continue, will destroy plaintiffs' trade and prevent their carrying on said business. Facts are stated showing the character and extent of plaintiffs' business, their inability to get another room in the town, and that the defendants, unless restrained, will continue to carry on the skating-rink as aforesaid.

Prayer is for an injunction and damages. The court assessed damages at one cent, and enjoined the defendants from carrying on the skating-rink in said hall in such manner as to annoy the plaintiffs and render the further use of their store impossible and uncomfortable, or so that the noise thereof will interfere with the use and enjoyment of said storeroom.

"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable

1. enjoyment of life or property, is a nuisance, and the subject of an action." §291 Burns 1908, §289 R. S.

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See *Acme Fertilizer Co. v. State* (1905), 34 Ind. App. 347, 107 Am. St. 190.

The appellants had a right to keep a skating-rink. But while a lawful business is not a nuisance *per se* when it is so situated and conducted as to interfere with the free

2. use and enjoyment of another, it may become a nuisance. The rule that every man shall so use his own as not to interfere with others extends to every use, and the mere lawfulness of the business will not justify interference with or the destruction of the comfortable enjoyment of his property by another. The complaint shows an interference with the appellees' comfortable enjoyment of their property. It does more than that, it shows that their business will be destroyed if the skating-rink is operated in the manner and at the times described. Appellants correctly assert that facts and not conclusions must be stated in the pleading, but the complaint is not defective in such respect. To require the names of the customers driven away to be stated would be to require the evidence to be pleaded.

The character of the injuries complained of is not such as to enable us to say that a judgment for damages would afford full compensation. On the contrary, the damage charged is of such a nature as to be practically impossible of ascertainment. The demurrer was rightfully overruled.

Decree affirmed.

BEANING v. SOUTH BEND ELECTRIC COMPANY ET AL.

[No. 6,664. Filed February 2, 1910.]

1. PLEADING.—*Complaint.*—*Insufficiency.*—*Directing Verdict.*—*When Judgment Affirmed on Complaint.*—*Defects Cured by Verdict.*—Where a complaint is insufficient and the case is tried, a verdict being ordered for the defendant on the ground of the insufficiency of the evidence, the Appellate Court will not affirm the judgment on the insufficiency of the complaint, unless the

facts stated are not sufficient to bar another action for the same cause, otherwise the defects of the complaint will be deemed as cured by the verdict. pp. 266, 267.

2. **NEGLIGENCE.—Telegraphs and Telephones.—Complaint.—Bar-ring Another Action.**—A complaint alleging that defendant telephone company negligently attached a cable to a cable seat, thereby grounding the cable seat and causing injury to a city employe who was ascending the telephone pole in order to make repairs, and that defendant electric light company negligently maintained an uninsulated high voltage wire so near such pole as to come in contact with one climbing such pole, thereby injuring such employe, is sufficient to bar another action for such injury. p. 266.
3. **TRIAL.—Directing Verdict.—Jury.**—Where there is any evidence, direct or inferential, tending to support the plaintiff's cause of action, a verdict for the defendant should not be directed. p. 267.
4. **TRIAL.—Directing Verdict.—Joint Defendants.—Negligence.**—In an action against two defendants for negligence, if there is evidence tending to support a judgment against one or both, a judgment on a directed verdict for both will be reversed. p. 268.
5. **NEGLIGENCE.—Trespassers.—Licensees.**—The owner of property is not liable to trespassers or bare licensees for mere negligence. p. 271.
6. **TELEGRAPHS AND TELEPHONES.—Electric Lights.—Use of Poles by Others.—Streets.**—Telegraph, telephone, electric light and other companies licensed to set poles along the streets of cities impliedly consent to the use of such poles by the employes of others for the purpose of properly maintaining their wires. p. 271.
7. **TELEGRAPHS AND TELEPHONES.—Electric Lights.—Poles.—Use of, by City.—Negligence.**—Where a city maintains a police telephone system using the poles of a telephone company, such company, as well as an electric light company, whose poles are set in the street under a license from the city, are liable for negligence to a city employe who climbs such poles to repair the city's wires, and receives injuries by coming in contact with their wires. p. 272.
8. **TELEGRAPHS AND TELEPHONES.—Electricity.—Negligence.—Complaint.—Proof.**—An allegation that the plaintiff, a city employe engaged in disentangling its police telephone wires from the company's wires, had an express invitation from defendant telephone company to climb its poles in the prosecution of his work, is supported by proof of an implied invitation. p. 276.
9. **TELEGRAPHS AND TELEPHONES.—Electric Light Companies.—Negligence.—Poles.—Contributory Negligence.**—Telephone and electric light companies are liable for negligence in the maintenance of their poles and wires; and it is no defense that the in-

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jured employe might have escaped injury by doing his work in some other manner. p. 277.

10. NEGLIGENCE.—*Electric Light Companies.—Uninsulated Wires.*—An electric light company maintaining a defectively insulated wire so close to a telephone pole that it injured an employe right-fully climbing such pole, is liable therefor. p. 277.
11. NEGLIGENCE.—*Joint.—Complaint.—Proof.—Telephone and Electric Light Companies.*—A complaint alleging that defendants telephone and electric light companies by their alleged particular acts of negligence caused injuries to the plaintiff, will support a verdict against one or both of such companies. p. 278.
12. NEGLIGENCE.—*Telephone and Electric Light Companies.—Directing Verdict.—Evidence.*—Evidence tending to show that defendant electric light company maintained an uninsulated wire so near to a cable seat on a telephone pole that a city employe in climbing such pole was injured thereby, and that defendant telephone company maintained a cable attached to a cable seat by means of a wire, thereby causing such employe, when he came near such uninsulated wire to receive a shock therefrom, is sufficient to entitle the plaintiff to a submission of his case to the jury as against each defendant. p. 279.
13. NEGLIGENCE.—*Contributory.—Question for Jury.—Telephone and Electric Light Companies.*—Whether a city employe who in disentangling the police telephone wires from those of a telephone company climbed the company's pole and in so doing received a shock from an electric light wire maintained uninsulated near the telephone pole which supported a cable attached to a cable seat by means of a wire, was guilty of contributory negligence, is a question for the jury. p. 280.

From Laporte Circuit Court; *John C. Richter*, Judge.

Action by Thomas H. Beaning against the South Bend Electric Company and another. From a judgment for defendants, plaintiff appeals. *Reversed.*

Osborn, McVey & Osborn and *J. F. Gallaher*, for appellant.

A. G. Graham, Anderson, Parker & Crabill and *Charles P. Drummond*, for appellees.

RABB, J.—Appellee South Bend Electric Company is a corporation engaged in the manufacture and sale of electricity for light and power purposes in the city of South Bend, and,

by license from the city authorities, its product is carried through the streets and alleys of the city, over wires strung on poles erected therein. Appellee South Bend Home Telephone Company is a corporation engaged in the transmission of messages, by means of electric telephones, in said city, and by a like license from the city is permitted to string wires upon poles erected by it along the streets and alleys of the city. The city of South Bend also maintains electric wires of its own, for the use of the public authorities of said city, one of which wires is used as a fire alarm, connecting all parts of the city by what is known as the "Gamewell Fire Alarm Telegraph System," with the city fire department; another is used by its police department, by means of which its officers in various parts of the city communicate with police headquarters. These city wires are at certain places in the city attached to poles belonging to appellee telephone company. One of the telephone company's poles, to which was attached a city police wire, was located at the intersection of Lindsey street and Portage avenue. This pole was about fifty feet high, and had five cross-arms on it, for the purpose of carrying the telephone wires. Underneath the cross-arms was a cable-box, and at a convenient distance below was a wire cable seat, maintained for the workmen, engaged at work on the cable-box, to sit upon while at work.

This cable seat was supported by arms extending out from the pole, and iron braces extending from the outer edge of the seat down about three feet below to the pole. This pole was provided with iron steps, consisting of spikes driven into the pole on either side, and extending out four or five inches from the face of the pole, and located at a convenient distance from each other, enabling a man to climb up the pole thereby. A cable containing a large number of wires was attached to the pole, coming to the pole from the southeast, and passing down the pole and beneath the cable seat, and up through the hole in the cable seat to the cable-box, from whence the wires were distributed to numerous pegs on

the arms of the telephone pole. This cable was connected with the cable seat by means of a small wire partly insulated. Within a distance of two feet from this pole, appellee electric company maintained a pole, about thirty feet in height, with two cross-arms, for the purpose of carrying electric light and power wires, and upon which there were at the time of the plaintiff's alleged accident, two wires, each carrying 2,200 volts of electricity. One of these wires was also attached to the telephone company's pole, by means of a bracket which held it a few inches from the body of the pole. This wire was attached in such close proximity to one of the braces supporting the cable seat, before mentioned, and to one of the steps on the pole, that the body of one engaged in climbing the pole was liable to come in contact with the wire and said iron brace or steps at the same time.

The appellant was engaged in the service of the city of South Bend, and the duties of his position required him to look after the city's wires, and keep them in good order for the transmission of messages over them. While he was thus engaged in the discharge of his duties to the city, he had occasion to climb the before-mentioned pole, belonging to the telephone company, to which was attached the city's police wire, and while doing so came in contact with the electric company's wire, at a time when he had hold of said brace to the cable seat, by reason of which a current of electricity was caused to pass through his body, severely burning his arms and hands, and the shock of which knocked him from the pole and caused serious injury.

Appellant brought this action against the appellees to recover damages for such injuries. His complaint proceeded upon the theory that each company was guilty of negligence proximately contributing thereto. It is charged against the telephone company that it was negligent in attaching the cable to the cable seat with a wire, and by such means grounding the cable seat, and endangering persons who, in the performance of their duties, might rightfully climb the

pole, and thereby come in contact with the cable seat and the nearby heavy voltage wire of appellee electric company; that appellee electric company was guilty of negligence in failing to keep its heavy voltage wire, attached to the telephone pole, properly insulated, and that these acts of negligence concurred in producing appellant's injury.

A demurrer of each appellee to the complaint was overruled, issues were formed, a jury trial had, and, after the evidence was heard, the court instructed the jury to return a verdict in favor of each appellee, and the giving of this instruction is the error relied upon for the reversal of the case.

It is insisted by appellee electric company that the judgment of the court below should be affirmed, without a consideration of the evidence in the case, for the reason

1. that appellant's complaint fails to state facts sufficient to constitute a cause of action against either appellee. The respect in which it is claimed the complaint is defective is in its alleged failure to state facts disclosing a duty on the part of appellees, or either of them, owing to appellant to protect him from injuries, alleged to have been received. This question, as it is here presented, has the same legal aspect as though the complaint had never been assailed by demurrer, and the question of its sufficiency was raised for the first time in this court; and where this is so, if the facts averred in the complaint are sufficient to bar another action for the same cause, the complaint will be deemed sufficient, and its defects cured by verdict. *Major v. Miller* (1905,) 165 Ind. 275; *Embree v. Emerson* (1905), 37 Ind. App. 16.

It is perfectly manifest that had appellant abandoned this appeal and brought a second action against appellees to recover for this same injury, and in his second com-

2. plaint cured the alleged defects pointed out by appellees, by the averment of facts clearly imposing a duty upon the part of appellees to exercise reasonable care to

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protect appellant from the injury complained of, the judgment in this case would be a complete bar to such action.

This case was submitted to the jury upon the theory that the complaint properly averred every fact essential to create liability on the part of appellees to appellant for the

1. injury complained of, and appellant was defeated because, in the judgment of the trial court, the evidence failed to sustain the averments of the complaint, and the appellant, having been thus defeated, could not ignore the judgment and again return into court with the second complaint against appellees, to recover for the same injury caused by the same alleged acts of negligence, distinguished by a more amplified statement of the facts, showing the relation of parties, and more clearly exhibiting the duty owing by appellees to the appellant to protect him from the injury alleged to have been sustained; hence the decision of this appeal will necessarily turn upon the question as to whether the evidence justified the peremptory instructions given by the court.

If the evidence given upon the trial of a case is insufficient in law to sustain a verdict in favor of a party having the burden of the issue, it is not only proper, but it

3. is the duty of the court, to direct a verdict upon such issue against such party; but if there is any evidence to sustain such verdict, no matter what its weight or character, nor how much it may apparently be overborne by more convincing evidence, conflicting therewith, the decision of the issue must be submitted to the jury. *Pennsylvania Co. v. McCormack* (1892), 131 Ind. 250; *Jacobs v. Jolley* (1902), 29 Ind. App. 25, and cases cited. The evidence, in the sense here used, consists, not only in what directly appears from the testimony of the witnesses, and is shown by writings or exhibits introduced in evidence, but also what may reasonably be inferred from what is thus shown.

Here there were two defendants, and their separate mo-

tions for peremptory instructions were sustained, and if the evidence was such as, viewed in its most favorable

4. light for appellant, would sustain a verdict and judgment in his favor against either appellee, then, as against such appellee, the judgment must be reversed.

The evidence disclosed the facts hereinbefore related, and, in addition to these, there was also evidence from which the jury might have found that the city's fire alarm and police wires ran through a network of wires belonging to appellee telephone company, attached to the arms of the telephone pole, from which the appellant fell, and in close proximity to it, and that these wires of the city and the telephone company were at all times liable to, and often did come in contact with each other, and that when they did so such contact interfered with the usefulness of both wires, and that in order to keep the wires of the telephone company and the city in good working order, and make them effective to perform their office, it was necessary that servants of the city and of the telephone company should ascend this pole to examine as to trouble on the wires, and to remedy the same. It appears also from the evidence that there were numerous other telephone and telegraph companies, besides appellee, using the streets of the city for their wires, presumably under the same authority as that possessed by appellee, and that in stringing these wires, in crossing over each others' lines, it was necessary that the employes of the city and of all other telephone, telegraph and electric power and light companies, engaged in work, ascend each others' poles to effect the crossing and to keep the lines in working order, and that in doing this work such employes were liable to handle grounded wires; that telephone and telegraph wires carry a harmless voltage of electricity, but that electric light and power wires usually carry dangerous voltages of electricity, and that a light and power wire, coming in contact with telephone and telegraph wires, or any conductor of electricity extending to the ground, at a point where the same is

not properly insulated, will transmit a dangerous current of electricity to such telephone or telegraph wires, or other conductor, and if a person comes in contact with such electric current death or injury inevitably follows; that electric light and power wires are not dangerous if properly insulated; that it cannot be certainly determined by looking at an insulated wire whether or not the insulation is perfect; that a telephone pole, when wet, is a conductor of electricity; that telephone wires contained in a cable are grounded; that it is not customary or proper to attach a telephone cable to the cable seat; that in putting up telephone cables it is the custom to attach the cable temporarily to the cable seat by means of what is known as a "marline string," a nonconductor of electricity, to hold the cable while the wires in the cable are attached to the wires in the box; that the wire cable on the pole involved here had been up for some time prior to the accident; that at the time of the accident it was attached to the cable seat by a small and partly insulated wire, as already stated.

The appellant was informed of trouble in the police alarm wire. He traced the trouble to where the police wire crossed the telephone company's wire, near this pole, and it was necessary, in order definitely to locate the defect, to ascend to near the top of this telephone pole. The city's employes had been expressly authorized, by the president and manager of the telephone company, to climb the company's poles to locate and adjust trouble between the wires, but enjoined not to use spurs in climbing the pole, and for the purpose of ascending this pole the appellant climbed the electric light pole, by the use of spurs, until he reached the steps on the telephone pole, a distance of ten or twelve feet from the ground, and then passed over to the steps on the telephone pole, went up the pole on the southeast side thereof until he reached the light wire, when he placed his left foot on the southwest step of the pole, his left arm around the pole, swung his body around to the west side of the pole, caught

hold of the brace to the cable seat above the light wire, and far enough out from the pole so that his arm was not in contact therewith, and reached up with his left hand to take hold higher up on the pole, when the movement in some way brought his left arm in contact with the light wire, and he was shocked and received the injuries complained of. The appellant could have climbed the pole on the opposite side, and probably could have escaped contact with the wire, as it is shown there was room enough for his body to pass between the two wires. He did not see that the cable seat was attached to the cable in any way. By a careful examination, if his eyesight was good, he might have seen that the cable was attached to the cable seat, but the evidence is such as to warrant the jury in finding that the appellant could not, by a careful observation, distinguish the wire, with which the cable was so attached to the seat, from a string. There was evidence tending to show that the light wire was six or seven years old, and that the insulation upon it near where it was attached to the telephone pole was so defective that the electric current carried over the wire was permitted to escape in such quantities as to shock those passing the wire in climbing the pole, who at the time were in any manner connected with a grounded conductor of electricity, and that this condition had existed for two or three months prior to the happening of the accident.

There are three grounds upon which appellees insist that the instructions of the court were justified. One is the same as that urged against the sufficiency of the complaint—that the evidence fails to show a duty owing by appellees or either of them to appellant, requiring them to exercise care in the respect in which they are charged with negligence, in that the evidence affirmatively shows that the appellant was a trespasser upon the pole, or at most a bare licensee. The second is that the evidence fails to show that the appellees were guilty of negligence proximately causing the injury com-

plained of. The third is that the appellant's own negligence proximately contributed to his injury.

Many authorities are cited to sustain the rule that the owner or occupant of premises is under no legal duty to keep his premises safe for those who enter the same as

5. trespassers or bare licensees. This rule we fully recognize, and we agree with appellees' contention that it matters not, in the application of this rule to this case, whether the telephone pole in question is to be regarded as real estate or personalty. The pole belonged to the telephone company, and if the appellant had no right upon it, or if he went upon it by mere permission of the owner, for the sole benefit of himself or his employer, and upon some business in which the owner of the pole had no interest, every reason of the rule would apply to him, but we are not convinced that the facts shown by the evidence bring this case within the rule invoked.

The uses to which electricity is applied has filled the streets of every city in the country with a network of electric wires, carrying over them electric currents of varying

6. powers and for various purposes. The owners of these utilities derive their right to carry their wires through such streets by license from the city in which their operations are carried on. By granting such license to one, the city is not thereby precluded from granting a like license to others, and all who so use the public streets do so upon an equality of right, and it seems but reasonable to assert that such persons or corporations, accepting and using such licenses from the city, do so subject to the right of the servants of each to climb the poles belonging to the others, and handle the others' wires, in whatever way may be necessary for their erection and maintenance.

The peculiar nature of the business that these telephone, telegraph, light and power companies are engaged in, the liability of their wires to interfere with each other, and,

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through the medium of each others' wires, to inflict

7. great damage to the property of each other, and to endanger the lives of their employes and of their patrons—the public—create rights, duties and obligations of these companies, with reference to each other, peculiar to the business. If telephone or telegraph wires come in contact with each other the usefulness of both is destroyed for the time. If the electric light wire happens to come in contact with the wire of a telephone company, at a point where the light wire is not properly insulated, the telephone wire will rob the light wire of its power, and with it not only burn out and destroy the telephone company's switchboards, but may kill and injure its employes and patrons, so not only both companies, but the public as well, are concerned in everything that would tend to prevent such disaster, or remedy any trouble between the wires. The mutual interest of the companies concerned and the safety and protection of the public require that the employes of each company shall be accorded the right to use the others' poles and handle their wires when necessary to locate and remedy defects arising from the crossing of each others' wires, and these considerations would seem to require each company to exercise reasonable care to protect the employes of the other company so engaged. Here it appears that the city's fire alarm and police wires crossed the telephone company's wires, running through a maze of them. The use of these wires facilitated the preservation of peace and good order and the suppression of fires within the city. That they should be kept constantly in good working order, and any interference therewith promptly remedied, is important to the protection of the lives and property of the citizens, and could it be seriously maintained that the telephone company has the right to say to the city, "Your employes shall not touch our pole or wires. Fires may rage and riots progress, but if your wires are out of order, before the firemen can be summoned

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or the police called out over your wires, you must bide our time to remedy the defect?" We think not.

Appellees do not seriously question the right of the city to use the telephone pole in correcting trouble upon its police and fire alarm wires, but claim that such right amounts to nothing more than a license by law, and that the duties and obligations of the appellees to one who exercises such license are precisely the same as those which would govern under a bare license or permission given by the owner for one to enter his premises for some purpose of the licensees, in which the owner has no interest, and cite as supporting this contention, among other cases, *Woodruff v. Bowen* (1894), 136 Ind. 431, 22 L. R. A. 198, and *New Omaha, etc., Light Co. v. Anderson* (1905), 73 Neb. 84, 102 N. W. 89. In the case of *Woodruff v. Bowen, supra*, a fireman, in the discharge of his duty, entered upon defendant's premises, to aid in the extinguishment of a fire, and, owing to the negligence of the defendant in constructing the building, the walls collapsed, killing the fireman. It was held that the defendant was not liable; that the fireman was a mere licensee on the defendant's premises, to whom the defendant owed no duty in respect to maintaining his premises in such condition that firemen would be reasonably safe thereon, in putting out fires. The case of *New Omaha, etc., Light Co. v. Anderson, supra*, was of a similar character. There was an injury to a fireman, while at work at a fire, because some of the fire apparatus, with which the fireman was engaged at work, came in contact with one of the defendant's light wires. Here the same rule was applied. In other cases, this rule is applied where police officers, in the discharge of their duties, enter premises and are injured by reason of some dangerous obstruction or pitfall thereon. All cases of this class, we think, are to be distinguished from the case here.

In the case of *Chicago, etc., R. Co. v. Dinius* (1908), 170 Ind. 222, 231, the Supreme Court said: "The rule well

affirmed by the authorities is that under the law, a person is required to anticipate or foresee and guard against what usually happens or is likely to happen, but this rule does not require him to anticipate or foresee and provide against that which is unusual and not likely to happen, or, in other words, that which is only remotely and slightly probable. * * *

A wrongdoer cannot be held responsible for a consequence which is merely possible according to occasional experience, but only for a result or consequence which is probable according to the ordinary and usual experience of mankind." It is this principle, that lies at the base of the rule announced in those cases, which exempts the property owner from liability for personal injuries to those who on extraordinary occasions enter their premises in the discharge of official duties, but we apprehend that it could not be applied where the conditions are such that the party charged with negligence might reasonably have anticipated that the injury complained of, or one of like character, would result from his negligent act. Here the use of the telephone pole, by the city's employes, charged with the duty of keeping the city wires in order, was not an extraordinary or unusual occurrence, such as that which would bring firemen on a property owner's premises to extinguish a fire, or policemen in pursuit of an offender, but it was a matter of common occurrence, something usual and likely to occur in the conduct of the business of both companies and the city. The conditions were such that the appellees were bound to anticipate that employes of the city, or of their own or of another telephone or telegraph company, would, in the performance of duty, use this pole, as appellant did, and that if their wires were not properly guarded said servants would be liable to receive injuries therefrom. We think the nature of the business conducted by the parties and the conditions were such, that an invitation to use appellees' poles was necessarily implied, and this use was not for the benefit of the party making use of the invitation alone, but for the benefit of both

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parties, and a duty necessarily rested upon each company maintaining the poles and wires, not only to protect their own employes, but the employes of the city having the right to use them. The duties and obligations of the respective parties to each other and to their respective employes, in this case, are very analogous to those of railways and other common carriers, whose lines intersect or pass over premises in which both have rights, as illustrated by the cases of *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399, and *Chicago, etc., R. Co. v. Vandenberg* (1905), 164 Ind. 470. In the case last cited it is said: "We have in the complaint a statement of facts going to show that plaintiff was lawfully on the premises or railroad of appellant at the time he was injured. He was there, not as appellant's servant, nor merely at its sufferance, but in a legal sense upon the invitation given through the contract entered into between the two railroad companies. Under these circumstances, appellant owed him a legal duty to exercise reasonable care to keep all parts of its road used by his employer, under the contract in question, in a reasonably safe condition, so as to provide for the protection of the servants of said Chicago Junction Railroad Company, while they were at work in operating the train of the latter over appellant's road."

We think the principle announced in these cases should govern here. It is true that in the case of *Chicago, etc., R. Co. v. Vandenberg, supra*, it is said that appellee was on the premises of appellant, upon the invitation of appellant, given through the contract between the two companies, and in this respect the case at bar may be distinguished from the case referred to; but, in the judgment of this court, the circumstances shown by the evidence heretofore referred to, relative to the peculiar character of the business in which the parties were engaged, the relation of the city's wires to appellees' wires, and the imperative necessity, in the successful operation of all the wires, that the employes of each should use the pole properly to locate and remedy trouble arising

from crossed wires, are fully as effective to raise the inference of an invitation on the part of appellees to the city's servants as if an invitation were given through the medium of a formal contract between the city and the company.

It is insisted by appellees, that, inasmuch as the appellant avers in his complaint an express invitation from the telephone company to use the pole in question, appellant

8. is bound by the averments in his complaint, and is not authorized to recover upon an implied invitation growing out of the circumstances shown. We think there is no merit in this contention, and that it is immaterial to appellant's case whether the duty of the appellees to exercise reasonable care to protect the appellant from injury in climbing the pole arose from an express or implied invitation. The evidence showed express permission given by the telephone company to the city's employes to use its poles whenever necessary to keep the city's wires in order, and it is argued that it was under this express permission that the appellant acted in climbing the pole, and that the permission was a bare license, granted for the benefit of the city alone. This contention does not fit the facts disclosed by the evidence. The thing which affected the city's wires, and which the city's employes were given permission to use the poles to discover and adjust, also affected the telephone company's lines, and when appellant remedied trouble on the city's wires he likewise remedied a trouble on the telephone company's wires, and where there is a mutuality of interest in the subject to which the visitor's business relates, an invitation is implied from the permission given, as is clearly shown by the authorities cited by appellees. 3 Elliott, Railroads (2d ed.), 1249; *Plummer v. Dill* (1892), 156 Mass. 426, 31 N. E. 128, 32 Am. St. 463; *Hart v. Cole* (1892), 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; *Benson v. Baltimore Traction Co.* (1893), 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. 436; *Bennett v. Louisville, etc., R. Co.* (1880), 102 U. S. 577, 26 L. Ed. 235; 2 Jaggard, Torts, p. 896; Beach,

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Contrib. Neg. (3d ed.), §51; *Kink v. Lowry* (1906), 38 Ind. App. 132. Whether the invitation is to be implied from the circumstances or from the express permission given, the rights and duties of the parties are the same.

The point is made by appellees, conceding that appellees owed appellant a duty to exercise ordinary care in protecting him from danger while engaged at work on the pole,

9. the evidence shows the discharge of this duty, by providing the steps upon the pole, which, had the appellant used, instead of taking hold of the brace to the cable seat, no injury would have been sustained. The charge of negligence made against the light company is that it failed properly to insulate its wire to prevent the escape of the electric current, and that by reason of this negligence the electricity did escape from its wires, and caused the injury complained of. This charge is not answered by saying that appellant might have pursued some other line of conduct on the occasion in question, and thereby have escaped injury. If he might have done so, the fact was proper to consider on the question of contributory negligence, but it does not answer the charge of negligence made against the appellees. In order to sustain this charge, it was not necessary that the appellees should have anticipated the particular accident that happened. It is sufficient, in this respect, if conditions were negligently suffered to arise or continue, by the appellees or either of them, out of which it might reasonably have been anticipated that injury in some form might follow to some person, and that the injury complained of is the natural and reasonable consequence of the negligence. 1 Thompson. Negligence (2d ed.), §59; *Evansville, etc., R. Co. v. Bailey* (1909), 43 Ind. App. 153, and cases cited.

To make out the charge of negligence preferred against the light company, it was not essential that appellees should have anticipated that appellant or some one else would

10. be shocked by a connection made between its defectively insulated light wire and the grounded wire

cable. It was sufficient, in this respect, if a grounded connection was likely to be made between their defective wires and any conductor of electricity with which one using the pole might come in contact and be injured. And there was ample evidence to justify the jury in the conclusion that if an electric light wire, situated as it was, was not properly insulated some person using the pole was liable to be injured on that account. It is insisted that the light company did not know, and so far as the evidence was concerned, had no means or opportunity of knowing, that there was a metallic connection between the cable and the cable seat. From what we have already said, this was not important. There was evidence from which the jury might have found that the light company did know, or by the exercise of such care as the circumstances imposed upon it could have known, that its wire was not properly insulated at the place where persons in climbing the pole were likely to come in contact therewith, and that its leaving it in that condition was an act of negligence.

It is also insisted by appellees that, inasmuch as the complaint charges acts of joint and concurring negligence in the two companies, proximately causing the injuries com-

11. plained of, in order to sustain his case appellant was required to establish the negligence of both companies, and that a failure of proof as against either would require a verdict in favor of both, and that the evidence is entirely insufficient to sustain the verdict against the telephone company, for the reason that it is not shown that the telephone company had any knowledge of the metallic connection between the telephone seat and the cable, or any opportunity of knowing that there was such connection, and that it had no opportunity of knowing and was not chargeable with notice of any defect in the insulation upon the electric wire. We do not agree that the conclusion follows that it is necessary to appellant's case that the evidence shall show that both defendants were guilty of negligence charged against each, and

resulting in the appellant's injury. There may be several proximate causes of a particular injury, some of them innocent, and for which no liability exists on the part of any one; others may be the result of tortious acts of one or more. When this is true, each of the tort-feasors is jointly and severally liable for the injury resulting, and the fact that accidental or innocent causes or conditions and concurring wrongful acts of other parties join to produce the given injury does not affect the liability of any one of the wrongdoers. Here, if the electric company were guilty of negligence, which proximately contributed to appellant's injury, the fact that the attachment of the telephone company's wire cable to the telephone seat concurred in producing the injury, and that for this incidental connection the telephone company was not guilty of negligence, would not affect the liability of the electric company. The connection between the cable seat and the cable was a mere condition, which in and of itself would have been entirely harmless. It was a condition upon which the electric light company's negligence operated and produced the injury.

Can it be said that there was not sufficient evidence to carry to the jury the question of the telephone company's negligence, as charged? There was ample evidence to

12. warrant the conclusion that the light wire was on the telephone pole, with the knowledge and consent of the telephone company, and the jury might well say that the close proximity of the light wire to the metallic telephone seat created a danger to those who used the pole, if a metallic connection were made between the grounded cable and this cable seat, and that to make such connection was negligence, and therefore the question of the telephone company's negligence must turn upon whether the evidence would have warranted the inference that the wire connection between the cable seat and the cable was made in the construction of the telephone company's line. The evidence showed that in putting up wire cables, such as the one on the telephone

company's line, in making the connection between the cable wires and the cable-box, it was necessary to suspend the cable to the cable seat while the work was being done, and that this was usually done by means of what is termed a "marline string." Here the cable was found suspended to the cable seat by means of a wire, precisely as it would have been by a string while the work of connecting the cable with the box was in progress, and the jury might easily have inferred that this wire was used instead of a string in doing the work, and that the persons who did the work had neglected to remove it on completing the job. No other reason for the wire's being there, as it was, has been suggested, and none other occurs to us. If this was not the way in which the wire became attached to the cable and the seat, such fact is peculiarly within the knowledge of the telephone company, and if this explanation of its presence is not correct, the company was called upon to show it.

It is insisted by appellees that appellant was guilty of contributory negligence in ascending the pole on the wrong side.

and in not observing that the cable was attached to

13. the cable seat by wire. Whether the appellant was guilty of contributory negligence was a question peculiarly for the jury, and could only become a question of law for the court when the circumstances were such that but one inference could be drawn by reasonable minds with reference to the appellant's conduct upon the occasion. The appellant did not, as a matter of fact, know that the cable was attached to the cable seat by the wire, and the jury might well have concluded that he had the right to assume that no such condition existed. That was not the proper method by which the cable was held, and when any attachment was used temporarily to hold the cable in place, while the wires were being attached in the box, it was a string, not a wire. If the appellant had seen this wire from the ground, the jury might well have found that its appearance justified the belief that it was a string, such as was customarily used for that pur-

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pose, and unless the cable seat was grounded there was no more danger in grasping the brace thereto than there was in grasping the steps; and as to ascending the pole on one side rather than the other, it was a question more of convenience than of safety. The wires were on both sides of the pole and the jury might well have believed that a person ascending the pole on either side was liable to touch a wire, and clearly a question of appellant's negligence in the matter was, under the facts disclosed, for the jury.

The judgment of the court below is reversed, with instructions to grant a new trial, with leave to the parties to amend their pleadings.

DODGE, EXECUTRIX, v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[No. 6,666. Filed February 3, 1910.]

1. JUDGMENT.—*Costs.—Finality.*—A judgment ordering that "all costs after November 7, 1893, be and the same are hereby taxed to" plaintiff's decedent, is complete and final. p. 283.
2. COSTS.—*Infants.—Next Friends.*—Next friends are liable for the costs of actions unsuccessfully prosecuted in their names on behalf of minors. p. 283.
3. COSTS.—*Appeal.—Judgment.*—A judgment of the trial court that decedent be taxed with all costs accruing after a named date includes the cost of a reversal in the Supreme Court after such date. p. 283.
4. DECEDENTS' ESTATES.—*Claims.—"Theory of the Case."*—The "theory of the case" doctrine does not apply to claims against decedents' estates. p. 283.
5. COSTS.—*Payment.—Defense of.—Appeal.—Reversal.*—The payment of a judgment for costs bars another action therefor, and judgment can be reversed lawfully, on appeal, only for substantial errors. p. 283.
6. INTEREST.—*Judgment.—Remittitur.*—Where a party relies upon a judgment of a certain date as the foundation of its claim, it should be allowed interest only from such date; and an excessive allowance may be ordered remitted on appeal, or a new trial may be granted. p. 283.

Dodge v. Lake Shore, etc., R. Co.—45 Ind. App. 231.

From Elkhart Circuit Court; *Anthony Deahl*, Special Judge.

Action by Lake Shore and Michigan Southern Railway Company against Nancy E. Dodge, as executrix of the will of Henry C. Dodge, deceased. From a judgment for plaintiff, defendant appeals. *Affirmed conditionally.*

John M. Van Fleet, for appellant.

Charles W. Miller, James S. Drake and Schuyler C. Hubbell, for appellee.

ROBY, J.—Appellant's decedent filed his written consent to act as and become the next friend of a minor plaintiff in an action against the appellee. Such proceedings were had therein as resulted in a judgment against appellee in the trial court, which was reversed by the Supreme Court, and judgment ordered for appellee on the answers to interrogatories. *Lake Shore, etc., R. Co. v. Peterson* (1896) 144 Ind. 214.

The judgment of the Supreme Court provided that appellee recover its costs, taxed at \$260, of which sum \$43.25 was paid by decedent. After said cause was remanded, the trial court, in accordance with the mandate of the Supreme Court, rendered judgment that the plaintiff take nothing from the defendant, and by agreement a motion to tax costs was continued. Subsequently the parties appeared, and the court made an entry as follows: "It is thereupon ordered by the court that all costs in this behalf accruing prior to November 7, 1893, be and the same are hereby taxed to Peter Johnson, who was the next friend to the plaintiff, to that date, and that all costs after November 7, 1893, be and the same are hereby taxed to Henry C. Dodge, next friend to the plaintiff after said date." The costs taxed in favor of the claimant herein which accrued in said cause after November 7, 1893, were taxed at \$461.85, which said costs consisted of the costs of the Supreme Court hereinbefore mentioned, including the \$260 mentioned in the judgment of reversal by the Supreme Court, less \$43.25 paid by decedent in his lifetime.

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The appellant contends that the record does not show a judgment against her decedent for costs. The language of the record in its entirety leaves nothing for further

1. consideration, and must therefore be regarded as a final judgment. *State, ex rel., v. Lung* (1907), 168 Ind. 553.

The appellant's objections are formal. By the express terms of the statute decedent was responsible for the

2. costs of the action. §257 Burns 1908, §256 R. S. 1881. See *Whittem v. State* (1871), 36 Ind. 196.

The amount of the judgment for costs rendered by the Supreme Court was included in the judgment thus rendered by the circuit court. Such action could in nowise va-

3. cate or discharge the judgment of the Supreme Court, but inasmuch as the "theory of the case" doctrine does not apply to claims against decedents' estates

4. (*Stanley's Estate v. Pence* [1903], 160 Ind. 636). and as the payment of this claim will be a complete bar to any future recovery, it is not apparent that

5. appellant is in anywise harmed, and it is only for substantial error that judgments can lawfully be reversed. §§407, 700 Burns 1908, §§398, 658 R. S. 1881.

Appellee expresses a willingness to remit so much of its judgment as the court may find excessive. It relies upon a judgment rendered January 11, 1897, and cannot con-

6. sequently claim interest from an earlier date. The judgment is therefore affirmed. if all interest except that accruing after January 11, 1897. is remitted, otherwise it is reversed and remanded for a new trial, and costs of this appeal are taxed to the appellee.

BOOS v. SIEGMUND ET AL.

[No. 6,635. Filed February 3, 1910.]

1. **HUSBAND AND WIFE.—Fraudulent Conveyances.—Payment of Debts.—Insolvency.—Preferences.**—A conveyance made by an insolvent husband to his wife in payment of a debt is not necessarily fraudulent as to creditors, though such conveyance operates as a preference in her favor. p. 285.
2. **TRIAL.—Special Findings.—Conclusions of Law.—Questioning Correctness of.—New Trial.**—The correctness of conclusions of law upon a special finding of facts can be raised by exceptions to such conclusions, but not by a motion for a new trial. p. 285.
3. **APPEAL.—Weighing Evidence.—Parties.—Examination of, Before Trial.**—A judgment for defendant will not be disturbed on appeal because his evidence at the trial was inconsistent with his testimony on his examination before trial. p. 285.

From Wabash Circuit Court: *A. H. Plummer*, Judge.

Suit by Jacob Boos against John F. J. Siegmund and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Bowers & Feightner, for appellant.

C. W. Watkins, for appellees.

MYERS, C. J.—The appellant instituted this suit against the appellees to recover an indebtedness on account of a certain contract, and to set aside a conveyance of certain real estate, made by appellee John F. J. Siegmund to his co-appellee Martha C. Siegmund, his wife, as having been made to defraud his creditors. The issue upon the alleged debt to the appellant was tried by a jury, and a verdict for a certain amount was returned in his favor against John F. J. Siegmund. Concerning the correctness of the verdict no question is raised. Afterward, the issues relating to the alleged fraudulent conveyance were submitted to the court for trial, and, upon the request of the parties, a special finding of facts, with conclusions of law thereon, was rendered.

No exception was taken to the conclusions of law, or to

any one of them, but the appellant moved unsuccessfully for a new trial, and the overruling of that motion is the only matter which the appellant has sought to present here, upon the alleged grounds that the special finding of facts was not sustained by sufficient evidence and was contrary to law.

The theory of the finding of facts was in agreement with that of the defense pleaded, to the effect that the conveyance in question was not made by way of the execu-

1. tion of a trust in favor of the grantee, but was made in payment of an indebtedness of the insolvent husband to his wife in preference to his other creditors. *Schreeder v. Werry* (1905), 35 Ind. App. 84; *State Bank v. Backus* (1903), 160 Ind. 682.

The argument for the appellant largely consists in a contention that the conclusions of law stated by the court upon the facts specially found were erroneous. Such error

2. if any, could be presented here only under exceptions duly taken in the court below to such conclusions, but not under the motion for a new trial.

The findings, so far as they are assailed as being unsupported by the evidence, were, as pointed out by the appellant, rendered upon evidence furnished by the testi-

3. mony of the appellees, partly upon their examination before the trial and partly in presence of the court upon the trial. If there was want of accord between their statements as witnesses at these different times, such discrepancy was a matter for the consideration of the trial court, the only question before us being, whether there was evidence upon which, if believed, the court below properly could find the facts as stated in the special findings. A careful reading of the evidence as set forth in appellant's brief discloses such basis for the findings, as stated by the court, that we cannot interfere.

Judgment affirmed.

CITY OF FORT WAYNE v. MERRIMAN,
ADMINISTRATOR.

[No. 6358. Filed February 3, 1910.]

1. NEGLIGENCE.—*Defective Bridges.—Municipal Corporations.—Pedestrians.*—A city owes no duty to a person injured by reason of a defective bridge, unless such person was using such bridge for a proper purpose. p. 285.
2. NEGLIGENCE.—*Proximate Cause.—Circumstantial Evidence.*—A city is not liable for injuries sustained because of a defective bridge unless such negligence was the proximate cause of the injury, but such negligence and proximate cause of the injury sustained may be established by circumstantial evidence. p. 288.
3. NEGLIGENCE.—*Cities.—Bridges.—Evidence.*—Mere evidence that a bridge belonging to a city was protected by a defective guard-rail, that the plaintiff's decedent was found dead under the bridge, and that the rail showed that she had fallen over at such point, is not sufficient to establish a liability against such city. p. 289.

From Allen Circuit Court; *E. O'Rourke*, Judge.

Action by Eli Merriman, as administrator of the estate of Mary Lyons, deceased, against the city of Fort Wayne. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Reversed.*

Guy Colerick, for appellant.*Emrick & Emrick*, for appellee.

RABB, J.—Appellee's decedent was killed within the city limits of Fort Wayne, by a fall from a bridge which forms a part of one of the city streets, where it crosses the Saint Mary river. This action was brought by appellee, as administrator of her estate, for the use and benefit of an alleged dependent child of the intestate, to recover for her death, which is charged to have resulted from negligence on the part of the city.

Issues were formed, and a jury trial had, resulting in a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment was rendered in appellee's favor upon the verdict. A reversal is asked upon the

ground, among other things, that the evidence is insufficient to sustain the verdict.

The appellant has brought to our aid in the decision of this appeal an able and carefully prepared brief, but from some cause appellee has failed to present us with a brief. and we are left to gather, as best we may, the theory upon which the appellee claims the evidence, which is practically without material conflict, makes out his case.

The bridge from which the decedent fell crosses the river from north to south, and the west side thereof, for the accommodation of pedestrians, is provided with a walk five feet in width, with a plank floor, the outside guarded by an iron railing consisting of two iron tubes, the upper one two inches in diameter, and three feet, three inches from the floor, and the lower one about one and one-half inches in diameter, and about half way between the upper rail and the floor. These are supported by iron posts fastened to the floor, and are attached to the posts by means of threaded holes in the posts into which the threaded ends of the tubes are screwed. The negligence relied upon to charge the city with liability for decedent's death, is its failure to exercise ordinary care to maintain the bridge in a safe condition for public travel, in that it permitted one end of one of the upper guard-rails to become so much out of repair that it came loose from the post supporting it, by reason of which, the decedent, while crossing the bridge in the darkness of the night and coming in contact with the rail, it gave way and she was precipitated to the ground below, her death resulting.

It appears from the evidence that about 11 o'clock on the night the woman was killed, she and a male companion were seen on the street together some distance from the bridge, going in the direction of it. A very short time afterwards the woman and her companion were discovered under the bridge, the woman in a dying condition, and her companion badly injured. One end of the upper rail of the bridge, im-

mediately over where the woman lay, was detached from the post, and the detached end hung down about eighteen inches. Her companion was standing near where she was lying. There was evidence that this rail was loose in the socket, and would come out, and that this condition of affairs had existed for a sufficient length of time to enable the city to learn of the defect and repair it. The evidence shows that while it was night, it was not so dark but that persons of normal eyesight, crossing the bridge, could see the walk. There is not a word of explanation from any source as to how the accident happened. The woman's companion testified as a witness at the trial of the case, but claimed that his memory was so impaired by his injuries that he was not able to recall anything that happened at that time.

From these meagre circumstances, could the jury properly infer all the facts essential to create a liability on the part of the city for the woman's death? The only negli-

1. gence chargeable to the city was with reference to the loose rail, and to render the city liable the plaintiff must show something more than that the city was negligent in failing to keep the rail in good repair, and that the woman fell off of the bridge and was killed. It must also appear that at the time of the injury, the woman was using the bridge for the purpose of ordinary travel; otherwise appellant owed her no duty. *Board, etc., v. Chipps* (1892), 131 Ind. 56, 16 L. R. A. 228; *Bucher v. City of South Bend* (1898), 20 Ind. App. 177.

It must also appear that the injury was proximately caused by the negligence complained of. It is true that both of these facts may be established by circumstantial evi-

2. dence, but the circumstances must be of such a character as to invite inference, and not leave it a matter of mere guess, suspicion or conjecture.

It is self-evident that the loose rail was not an active agent to produce the injury which resulted in decedent's death. It

did not throw the decedent and her companion from
3. the bridge. The most that could be claimed in that respect was that it failed to prevent her from falling, when some force brought her body against it. Some movement made by the persons themselves caused the fall from the bridge, and the movement that brought them against the defective rail, and threw them from the bridge, was clearly not a movement in the direction of either end of the bridge. And while the defective rail was out of place and down at one end, it still would present some obstacle to prevent a person from falling off of the bridge, and the decedent could not have fallen had not some force impelled her against the rail. There is no fact shown in evidence from which the jury could infer that she stumbled and fell against the rail of the bridge, or that she could have been crowded against it by a passing throng of travelers. So far as the evidence shows, she and her companion were alone on the bridge at the time. The circumstances shown, while they justify the inference that the decedent fell from the bridge, and fell over the defective rail, do not invite the inference that the defective rail was the proximate cause of the injury. What caused the woman to fall from the bridge is left by the evidence in profound mystery, and can only be a subject for speculation and conjecture. The court should have directed a verdict for defendant.

Judgment of the court below reversed, with instructions for a new trial.

ELLIOTT ET AL. v. ATKINSON ET AL.

[No. 6,696. Filed February 4, 1910.]

1. HUSBAND AND WIFE.—*Wife's Right to Contract*.—A married woman may contract to care for the children of another, not a member of her husband's family, and enforce payment therefor in her own name. p. 292.
2. HUSBAND AND WIFE.—*Contracts of Wife*.—*Caring for Infants*.—*Fraudulent Conveyances*.—A married woman who contracts to care for another person's children has the right to the compensation therefor; and land purchased with the money so received cannot be taken in payment of the debts of her insolvent husband. p. 292.

From Carroll Circuit Court; *James P. Wason*, Judge.

Suit by Almon D. Elliott and another against David Atkinson and another. From a judgment for defendants, plaintiffs appeal. *Affirmed*.

J. Walter Wilstach, *L. D. Boyd*, *G. W. Julien* and *O. E. Brumbaugh*, for appellants.

John W. Strawn and *Robert C. Pollard*, for appellees.

COMSTOCK, J.—Appellants, plaintiffs below and creditors of appellee David Atkinson, brought this suit against appellees to set aside an alleged fraudulent conveyance to appellee Belle Atkinson of certain described real estate, on the ground that the consideration for said conveyance was paid for with the money of appellee David Atkinson, and that Belle Atkinson paid no consideration therefor. It is asked that said real estate be sold, and the proceeds applied to the payment and satisfaction of appellants' claim against David Atkinson.

Upon issues joined the cause was tried by the court, resulting in a judgment in favor of appellees, and against appellants for costs. Appellants' motion for a new trial was overruled. The controlling question is whether the consideration for the conveyance of the real estate in controversy was paid by appellee Belle Atkinson with her own money, or whether

the consideration was paid with money which belonged to appellee David Atkinson.

The evidence shows, without conflict, that in the year 1894 the appellees were husband and wife, keeping house and living together, the husband furnishing the usual provisions, and that they "have ever since maintained said relation." In 1894 or 1895 Frank Cochran was a widower and the father of two children, one six months old and the other two years old. Appellee Belle Atkinson was a cousin of Cochran's deceased wife, and in no other way was she or her husband related to him. According to the testimony of Cochran and Belle Atkinson, and such testimony is without contradiction, the latter took these children to care for and support them. They lived with appellees and were treated as members of the family, and at the commencement of this suit were still with appellees. There was no express contract at the time the children were taken into the home of the Atkinsons as to compensation for their care, but Cochran, "of his own free will," paid to Belle Atkinson in 1901, \$150; in 1902, \$400; in 1903, \$300; in March, 1904, \$400; and in November, 1904, \$200, as compensation for said services. The money was delivered to her. "I gave the money to Mrs. Atkinson," is the language of Mr. Cochran. All the money, except \$200 paid in November, was deposited in the bank to her credit. In 1904, acting as agent for his wife, David Atkinson bought the real estate in question, and the deed was executed to her as grantee, and she paid for said real estate \$475 out of the money received by her from Cochran. At the time of said purchase, David Atkinson was insolvent. During the years Belle Atkinson cared for the children she had received more than \$1,000 as the result of her thrift and industry. When the property in question was purchased, the wife did not know that her husband was in debt, and had no intention to defraud his creditors. There is no direct evidence whether the original arrangement for the care of the children was with the husband or the wife. But, under the circumstances,

the age of the children being such as to call for the help of one especially fitted to take the place of a mother, would indicate that the arrangement was made with the wife. "The earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property." §7867 Burns 1908. §5130 R. S. 1881.

A married woman may lawfully contract to furnish board and perform services in caring for persons other than her husband or family, and may lawfully charge therefor

1. and enforce payment in her own name. *Hamilton v. Estate of Hamilton* (1901), 26 Ind. App. 114; *Wasem v. Kaben* (1910), *ante*, 221.

The services rendered in this case were rendered to one to whom Belle Atkinson owed no duty. The care required for these motherless children and received by them at her

2. hands was peculiarly within the offices of a woman.

They were not services she owed her husband or his family. While she "cared for and acted as a mother to these children," the facts do not bring the case within the rule. that where a wife performs services for a third person, at the time a member of her husband's family, and as a part of her household work, the compensation therefor belongs to the husband. These services were rendered for the father and paid for by him. They were paid to Belle Atkinson, and, under the law, the proceeds were and ought to have been her own.

Judgment affirmed.

CAMPBELL ET AL. v. BRACKETT ET AL.

[No. 6,745. Filed February 4, 1910.]

1. **APPEAL.**—*Briefs.*—*Waiver.*—Points not discussed are waived. p. 294.
2. **INJUNCTION.**—*Taxpayers.*—*Void Payments by Towns.*—*Failure to File Claim for Statutory Time.*—*Complaint.*—A complaint by taxpayers of a town alleging that the town board unlawfully allowed to defendant claimant \$400 for legal services, that no claim therefor was filed five days before the session of the board at which it was allowed, that such allowance was deposited in defendant bank, and praying that the bank be enjoined from paying such money to claimant and that it be ordered to return same to the town, is sufficient. p. 294.
3. **MUNICIPAL CORPORATIONS.**—*Towns.*—*Statutory Methods of Action.*—Boards of trustees of towns can perform their acts only in the statutory way. p. 296.
4. **MUNICIPAL CORPORATIONS.**—*Acts.*—*Validity.*—Acts of a town performed in direct violation of a statute are void. p. 296.
5. **MUNICIPAL CORPORATIONS.**—*Void Payments.*—*Recovery.*—*Injunction.*—Void payments made by a town do not become the property of the persons receiving them, and may be recovered by the taxpayers by injunction, or any other appropriate proceeding. p. 296.
6. **MUNICIPAL CORPORATIONS.**—*Violation of Statute.*—*Good Faith.*—That a town board acted in good faith in making a payment in violation of the law constitutes no defense for such act. p. 297.

From Fulton Circuit Court; *S. N. Stevens*, Special Judge.

Suit by Lyman M. Brackett and others against Charles C. Campbell and another. From a decree for plaintiffs, defendants appeal. *Affirmed.*

I. Conner and Charles C. Campbell, in pro per., for appellants.

J. H. Bibler and Holman & Stephenson, for appellees.

HADLEY, J.—Appellees, as resident taxpayers, instituted this suit to enjoin appellant Campbell from drawing from appellant bank, and to enjoin appellant bank from paying to Campbell, the sum of \$400, which appellees averred had been wrongfully allowed and paid to appellant Campbell by the town of Rochester. and by him deposited in appellant bank.

Appellant Campbell demurred to the complaint. This demurrer was overruled. Campbell then filed an answer, to which appellees demurred, which demurrer was sustained. Appellant bank answered that it had the money which had been received and deposited to Campbell's credit on December 13, 1905, by a check drawn by the town treasurer on December 12, 1905, in favor of Campbell. Appellant Campbell refused to plead further, and a decree was entered enjoining him from drawing or receiving, and the bank from paying to him, said money, and ordering said bank to return the money to the town.

The only questions presented are the overruling of appellant Campbell's demurrer, for want of facts, to the complaint, and sustaining appellees' demurrer for want of

1. facts to Campbell's answer. Other errors are assigned, but are waived by failure to discuss or present them in the briefs.

The complaint is grounded upon the alleged void action of the town board in allowing the claim upon which the money was paid. The bases of this charge are twofold: (1) That the claim was founded upon a void contract, having been made with an officer of the town; (2) that the claim was allowed without its being itemized, verified and filed five days prior to its allowance.

In our view of the case, it is unnecessary to consider the first ground, and, for the purpose of this case, the averments in regard thereto may be considered as surplusage.

2. The averments as to the second ground are to the effect that said Campbell was appointed attorney for the town on May 21, 1905, for one year, at a salary of \$200 per year, and extra compensation for all cases taken to the Supreme or Appellate Courts; that the present officers of the board are soon to go out of office; that on the night of December 12, 1905, after the citizens of the town, in attendance upon the meeting of the board on that evening, had departed, said board made an allowance to Campbell for the sum of

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\$400, without said Campbell's having filed an itemized and verified claim therefor five days previously, but upon a claim filed on that night and at no other time, as follows:

"Corporation of Rochester, Indiana. To C. C. Campbell, Dr. To legal services in the case of Town of Rochester v. The Rochester Electric Light Company and two cases of Rochester Electric Light, Heat and Power Company v. Town, \$400."

That thereupon the clerk issued to him a warrant of said town to the treasurer thereof, who in turn gave Campbell a check on appellant bank for the same in said amount; that said money is now on deposit in said bank, subject to the check of said Campbell; that Campbell has no property subject to execution out of which any judgment for said money can be satisfied, and unless the withdrawal or payment of said sum by or to said Campbell be enjoined the money will be lost to said town. Prayer for injunction and return of the money.

Section 237 of an act concerning municipal corporations (Acts 1905, p. 219, §8891 Burns 1908) reads as follows: "It shall be unlawful for the common council of any city or the board of trustees of any town, or any officer or board of either of such corporations, to allow any claim against such city or town, or to order the issue of any warrant for the payment of money by any such corporation, except at a session of such common council or board, unless expressly authorized by law so to do; and no clerk or other officer of any city or town shall draw any warrant in favor of any person until so ordered and allowed, unless authority so to do is given in this act. No such claim shall be allowed until duly itemized and verified, and filed in the office of the clerk and placed upon the claim docket at least five days before the session at which the claim is to be allowed. It shall be the duty of such clerk to enter such claim upon such docket, when filed, stating the name of the claimant, the amount claimed and for what, and the date of filing. When the

claim has been acted upon the clerk shall note upon the docket the action taken, and the docket shall at all times be open to any taxpayer for inspection. The clerks of cities and towns shall administer all oaths required by this section free of charge. Any city or town officer who shall violate any of the provisions of this section, and any clerk, city or town attorney, or other officer of any city or town, who shall directly or indirectly, aid or assist in seeking to recover any claim, or in the prosecution of any action against such city or town, shall, on conviction, be fined not less than \$50, and shall be removed from office."

The board of trustees of an incorporated town has only statutory power, and can perform its functions only in the statutory way. *Zorn v. Warren-Scharf, etc., Paving*

3. *Co.* (1908), 42 Ind. App. 213, and cases cited; *Moss v. Sugar Ridge Tp.* (1903), 161 Ind. 417.

Where the statute prescribes specifically how an act shall be performed by a statutory board, or prohibits its performance under certain conditions by such board, an act

4. in direct violation thereof is absolutely void. *McNay v. Town of Lowell* (1908), 41 Ind. App. 627, and cases cited.

Here the statute before quoted prohibits in the most positive terms the allowance of a claim as appellant Campbell's claim was allowed. The act of allowance being void.

5. all subsequent proceedings by which the money was placed in the hands of said appellant were void. No title to the money received thereby passed to said appellant, and it was subject to recovery wherever found. *McNay v. Town of Lowell, supra*, and cases cited. And if, as is shown here, it was located in the bank, and could only be preserved and recovered by injunction proceedings, then such proceedings were proper. *Hatfield v. Mahoney* (1907), 39 Ind. App. 499, and cases cited; *City of Logansport v. Jordan* (1908), 171 Ind. 121; *Jordan v. City of Logansport* (1908). 171 Ind. 280.

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It is no defense for appellants to say that all parties acted in good faith. As is said in the case of *McNay v. Town of Lowell*, *supra*: "As a rule, natural equity cannot flow from a violation of a prohibitive law, nor good faith afford relief from the penalties of its infraction."

What we have here said in reference to the complaint disposes of the question raised on the ruling on the demurrer to appellants' answer, since the answer specifically admitted that the claim was presented and allowed, as averred in the complaint. This being true, the averments of good faith and other extrinsic matters are no defense to the action. The statute we are here considering is a salutary one, enacted for the protection of the public against scheming and unscrupulous officers, as well as a protection to honest officers and employes of a town, by affording means and opportunity for investigating each claim before it is allowed. It was enacted to prevent such hasty action as is here shown. Whether the town owed appellant Campbell the money does not affect the question. He was not entitled to have his claim paid in this way, and, as town attorney, he violated the express provisions of the statute in thus receiving it. Under such circumstances, he has no title to the money thus received, or right to retain it.

Judgment affirmed.

MCCASKEY REGISTER COMPANY v. CURFMAN.

[No. 6,552. Filed January 6, 1910. Rehearing denied February 4, 1910.]

1. **SALES.—Mutual Rescission.—Instructions.—Evidence.—Applicability.—Agency.**—An instruction on the theory of the mutual rescission of the sale of a cash register is not applicable to the evidence where the defendant testified that he executed an absolute written order for such machine, that the agent told him that such order would not take effect until he had given the machine

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a trial and had accepted it, that he tried the machine, declined to accept it, and so told the agent who said: "Well, all right. You would better write to the company and tell them that you are going to ship it back." p. 303.

2. SALES.—*Contracts.—Principal and Agent.—Authority.—Burden of Proof.*—A merchant who executed an unqualified written order to an agent for a cash register knowing that such order would be sent to the company, assumes the burden of proving that such agent had authority to execute a collateral contradictory oral contract, binding upon the company, whereby the sale of such machine was optional upon such merchant's trial and acceptance thereof. pp. 303, 305.

3. EVIDENCE.—*Oral.—Varying Written Contract.—Fraud.—Mistake.*—Oral evidence is not admissible to vary a complete written contract, except upon a showing of fraud or mistake, but such evidence may be admitted to supply an omission from an incomplete contract. p. 304.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by the McCaskey Register Company against Nelson J. Curfman. From a judgment for defendant, plaintiff appeals. *Reversed.*

M. L. Spencer and *W. A. Branyan*, for appellant.

Bowers & Feightner, for appellee.

MYERS, C. J.—Appellant sued appellee to recover the price of a certain account register sold conditionally by the former to the latter upon a contract in writing, dated May 19, 1905, signed by appellee and by one Buettel, appellant's salesman, on a printed form designated thereon "Agent's Contract," addressed to the appellant at Alliance, Ohio, directing the appellant to make and ship by freight, as soon as convenient, to the appellee at No. 123 Market street, Huntington, Indiana, a McCaskey Account Register, No. 200, in consideration of which the appellee agreed to pay to the appellant \$55, "being the price of the register and the supplies herein ordered f. o. b. Alliance, Ohio." Payments were to be made in specified monthly instalments. Other provisions of the contract were:

"Five hundred pads in exchange for Keith, when shipped to factory. Should there be any failure to pay

draft or other demand for cash payments, it is agreed that the full amount of the purchase price shall become due and payable. Should there be any default in the payment of any instalment, it is agreed that all the remaining instalments shall at once become due and payable. In default of any payment, you or your agent may take possession of and remove said register without legal process, and in such case all payments theretofore made by the undersigned under this order shall be deemed and considered as having been made for the use of said register during the time the same remained in the possession of the undersigned, and shall be retained and kept by said register company as such payment. It is agreed that the title to said register shall not pass until the purchase price or any judgment for the same is paid in full, and shall remain your property until that time. This contract covers all agreements (expressed or implied) between the parties hereto. It is expressly agreed that this order shall not be countermanded."

The cause originated before a justice of the peace, and the complaint was the only pleading. On trial by jury in the court below, a verdict was returned in favor of appellee. The overruling of appellant's motion for a new trial is assigned as error. In support of its motion it is insisted that the court erred in refusing to admit certain evidence offered by appellant, in admitting certain evidence over its objection, in refusing to give certain instructions tendered by appellant, and in giving to the jury certain instructions. Also that the verdict was not sustained by sufficient evidence and was contrary to law.

It was shown in evidence that the register was shipped to the appellee at Huntington on or about May 29, 1905, or ten days after the date of the order; that it was returned to appellant at Alliance about September 9, 1905, without the consent of the company; that it has been taken care of by the company since its return, and held subject to the order, direction and control of the appellee; that it was in good condition when it was sent out, was in good working condition when it was returned, and is still

in good condition; that no part of the purchase price, which is past due, has been paid; that Buettel, the salesman who made the sale to appellee, quit the employ of appellant in November, 1905, and it is not known by any member of the company where he is or has been since that time; that appellee owned and carried on a grocery in one room and a meat shop in another room, both rooms connected by an arched opening; that he employed two men to assist him in the business; that he used another register; that appellant's agent, about May 19, 1905, having with him a sample register, went to appellee's place of business and endeavored to sell to him one of appellant's registers; that appellee testified that he told the agent he could leave his sample machine on trial; that the agent said he could not leave his sample, but he would send one from the factory. Appellee testified, in part, as follows: "And so I said 'All right.' And so he got out this paper [referring to the order], and wanted me to sign it, and I told him. 'No, I would not sign it.' " He further testified that the agent said it was just a form that they used in business, and that if appellee would sign it he (the agent) would keep it in his hands until appellee was satisfied with the machine, and sent his old machine in as a partial payment and made his first payment; that he was asked to make a payment and refused, saying he was not buying the machine, but taking it on trial. He testified that the agent said "that if it did not prove the difference between my old machine and the new one—the difference that was to be paid—I did not need to keep the new machine. I should just box it up and send it back." Appellee further testified that he used the new machine two or three weeks; that it was a complicated machine which he could not understand; that he did not know how to run it, and could not use it; that it was a machine "that you tore slips out of the back;" that it had a transfer paper that gave two slips at one writing, "and you would give the customer a

slip and pull down a leaf and stick the other in your register, and then the leaves would go back up again, and you would just have a slip in there, and they were liable to get lost or anything; and so I did not like it on that account; and there was a set of books beneath, and I did not like it on that account." He testified that he boxed up the machine and set it in his back room, and it was there three or four days, when the agent came back, and appellee told him he had the machine boxed up ready for shipment, and the agent said: "Well, all right. You would better write to the company and tell them that you are going to ship it back." Appellee wrote to the company, and did not receive an answer, and in August, 1905, shipped the machine back. Appellee further testified that the agent "said that I should write to the company before I sent it back, which I did. * * * Of course he wanted me to keep it, and he tried to talk to me about it; but after he found out that I would not keep it he told me that I should write to the people and tell them." Appellee kept his old machine. It further appeared in the testimony of appellee that before the execution of the contract the agent explained to him the working of the sample register, and the appellee locked it over. The one sent was like the sample, except that it was larger. Appellee read over the contract before he signed it. It read: "It is expressly agreed that this order shall not be countermanded." And he talked about that, and the agent told him it was not to be a contract unless he kept the machine. He talked with the agent about the whole contract, when he signed it and afterward. When asked on the trial why he did not insist on putting into said contract, before signing, that he was taking the machine on trial, he answered that he supposed the oral agreement was all right, and he had a witness there, who, however, did not sign, and who would have to depend on his memory as to what the contract was. Appellee testified that he sold his interest in the grocery, in a week or two

after he signed the contract, to Oscar Baker, who took possession. He sold the grocery a week or two after the register came. He testified that he intended to put the register in his meat market; that he had two accounts, and he intended to use the register in place of the old one; that he concluded he did not want it before he sold the grocery; that he had the machine boxed up before he went out of business; that he gave the register a good trial by using it, but he did not put all his accounts in it, because it was too much trouble; that the accounts he put in it were sales of both meats and groceries; that he charged the customers who dealt both in groceries and meats in one book; that he tried to get the man who bought him out to take the register, but he would not; that he tried to sell the register as a favor to the company, not as his own property; that he asked Baker if he wanted the machine, and he said, "No;" that he knew that Baker had to have another machine, and he (appellee) was going to keep his old one; that before he notified the company that he had sold out he asked Baker if he wanted to take the register and pay for it as he (appellee) would do if he should keep it; that he tried to get Baker to take it, as Baker had bought him out and he supposed he needed a machine; that he tried to sell it as the company's property as an accommodation, and because he did not want it; that he thought the company would want him to try to sell it—he knew he would.

The court excluded the testimony of the secretary and treasurer of appellant, offered in rebuttal; that the salesman, Buettel, was not authorized to cancel the order taken by him from appellee, and was not authorized to give appellee authority to return the register to the company; that no agent of appellant was authorized to allow appellee to return the register, nor to make any agreement about it, other than the written contract, which appellee signed. The testimony relating to the conversations between appellee

and the agent of appellant, tending to show an agreement between them inconsistent with the terms of the written order, was admitted over numerous objections of appellant, and the court in its instructions indicated to the jury that such oral agreement was binding upon appellant.

The court in an instruction told the jury that a party may sell property to another, and the parties may afterward mutually agree to rescind said contract; that

1. is, that the seller is to take back the property from the purchaser, and that in such cases if the parties mutually agree that the contract of sale is rescinded, then the seller cannot afterward collect the purchase price for the property from said purchaser.

Of this instruction it is to be observed that it was not relevant to the evidence. In the conversation between appellee and the salesman, after the sale, there was no agreement for rescission. The agent merely referred appellee to the company, and there was no other evidence of the consent of appellant.

In its rulings admitting evidence of the oral agreement with the agent, and in its instructions concerning such agreement, the court departed from well-settled law.

2. The agent was not shown to have authority to make any contract other than that expressed in the written order accepted and acted upon by appellant, and appellee had no sufficient reason to suppose that he would receive or did receive the register except upon the transmission of the order to appellant and the acceptance by appellant of its terms. In the case of *Singer Mfg. Co. v. Sults* (1897), 17 Ind. App. 639, there was a written contract between plaintiff and defendant for the conditional sale of a sewing machine. It does not appear that there was an agent in the transaction. Defendant was permitted to testify that, before the written contract was entered into, it was agreed between plaintiff and defendant that if the absent husband

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should be dissatisfied with the purchase, and would not approve it, plaintiff would return an old machine, taken in part payment, and the money delivered by defendant to plaintiff, and would take away the machine so sold to defendant. It was held that the admission of such evidence was erroneous; that when a written contract is complete it cannot be explained, modified or changed by inserting any conditions by parol, and, further, that fraud could not be predicated upon such an oral promise to be performed in the future. There is nothing in the contract in suit indicating that it was not complete in itself, or that it was collateral to some other contract not stated therein, as in the case of a bond stating no consideration, and showing by implication that it is collateral to some other agreement not stated. See *Singer Mfg. Co. v. Forsyth* (1886), 108 Ind. 334.

While in certain cases collateral oral matter may be admitted if necessary to complete the contract, it cannot be shown if it contradicts, adds to or takes from a com-

3. plete written contract. *Buckeye Mfg. Co. v. Woolley, etc., Works* (1900), 26 Ind. App. 7; *Cole v. Gray* (1894), 139 Ind. 396, 407. Courts will not relax the general rule except on the ground of fraud or mistake. *Brunson v. Henry* (1894), 140 Ind. 455, 462. When a contract is reduced to writing, the legal presumption is that the entire contract, as finally settled, is embraced therein, and all oral negotiations or stipulations between the parties, which preceded or accompanied the execution thereof, are to be regarded as merged into it, and it is to be treated as the exclusive medium of ascertaining the contract by which the parties are bound. *Cincinnati, etc., R. Co. v. Pearce* (1867), 28 Ind. 502, 506; *Reynolds v. Louisville, etc., R. Co.* (1896), 143 Ind. 579, 614; *Hostetter v. Auman* (1889), 119 Ind. 7; *Western Pav., etc., Co. v. Citizens St. R. Co.* (1891), 128 Ind. 525, 536, 10 L. R. A. 770, 25 Am. St. 462; *Diven v. Johnson* (1889), 117 Ind. 512, 3 L. R. A.

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308; *Conant v. National State Bank* (1889), 121 Ind. 323; *Gemmer v. Hunter* (1905), 35 Ind. App. 501.

There does not appear to be any pretense that the register was in any way defective, or that it did not correspond fully with the sample examined by appellee. There

2. was no evidence that the agent had any authority to do anything but to secure a written contract, acceptable to appellant, and transmit it to appellant. The agent was authorized, so far as appears, to solicit orders in writing only, upon a prescribed form. He and those dealing with him were bound by the restrictions necessarily implied from the act thus to be performed by him. If he exceeded his authority, and went beyond the apparent power given him by appellant, and his action was not ratified by the company, his action, so far as it exceeded his authority, actual and apparent, was not binding upon the company. "The distinction between special and general agents is of little or no practical value, so far, at least, as regards the principal and third persons. Whenever a dispute arises between them with reference to the authority of the agent, the question is not simply whether the authority is special or general, but it may also be very necessary to inquire, as will appear hereafter, whether the agent's acts are within the apparent scope of his authority." *Ewell's Evans, Agency*, *2. Again, the same author (*140) says, that in the case of a question between the principal and a third person who has dealt *bona fide* with the agent, "the true limit of the agent's power to bind the principal will be the apparent authority with which the agent is invested." In the case of *Robinson & Co. v. Nipp* (1898), 20 Ind. App. 156, it is said: "The authority of an agent must proceed from his principal. In ascertaining the extent of his authority we must look to what has been expressly or impliedly authorized before the act of the agent in question, or to the conduct of the principal after the act in relation

thereto, by way of adopting or rejecting it. * * * It is true that the liability of the principal for the conduct of the agent is not to be determined alone by the authority actually given to the agent, but the principal will be bound as if he had conferred the authority which the third person dealing with the agent was justified in believing to have been given to the agent; but the third person is thus justified not by the words or acts alone of the agent, but by the words or conduct of the principal. There must be an appearance of authority caused by the principal, and the agent must have acted within its scope."

In the case at bar appellant kept the means of protecting itself and also its customers from unauthorized acts of the agent, by reserving to itself the acceptance and adoption of a written contract transmitted to the principal in the form of an order. If the printed form contained too much or too little to satisfy the purchaser dealing with the agent, such purchaser was bound to eliminate or insert, or both, so as to show what proposal he desired the principal to accept. Such restriction upon the power of the agent was necessarily implied by the act to be done by him.

Appellee contends that the order in question was delivered to appellant's agent pursuant to an oral agreement previously made between him and the agent, to the effect that the written order should not become operative as a contract until he (appellee) had received the register, given it a trial, and was satisfied with it, and that proof of such oral agreement did not tend to contradict the contract in suit. As between the parties, want of delivery of an instrument, or that it was delivered upon a condition to be complied with before the instrument shall become effective as a contract, may be shown, although the condition may rest in parol. *Burke v. Dulaney* (1894), 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698. But this rule is not applicable to the case at bar. Here appellee was dealing with an agent whose authority, as we have seen, was circumscribed

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by the order, which appellee read and signed, directed to the company as a proposition for its acceptance. Appellee knew that the register was to come from the company and not from the party with whom the parol agreement, sought to be proved, was made. Throughout the trial the cause was controlled by an erroneous theory.

Judgment reversed, and cause remanded for a new trial.

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(No. 6,434. Filed June 22, 1909. Rehearing denied October 27, 1909. Transfer denied February 4, 1910.)

1. CONTRIBUTION.—*Foreclosure.—Complaint.—“Junior.”—“Inferior.”*—A complaint for contribution alleging that defendant's claims are “junior” to those of plaintiff sufficiently shows that such claims are “inferior” to those of plaintiff. p. 310.
2. CONTRIBUTION.—*Demand.—Redemption.—Complaint.*—A complaint by the personal representative of a redemptioner of four parcels of land sold in a body at sheriff's sale, such redemptioner owning only two of such parcels, need not allege a demand for contribution, the statute (§812 Burns 1908, §769 R. S. 1881), giving the redemptioner a lien therefor. p. 310.
3. PLEADING.—*Cross-Complaints.—Paragraphs.—Striking Out on Joint Motion.*—Sustaining a motion to strike out a cross-complaint consisting of several paragraphs constitutes reversible error if one of such paragraphs is sufficient to withstand such motion. p. 311.
4. PLEADING.—*Motions to Strike Out.—Questions Presentable.*—A motion to strike out a pleading does not raise the question of its sufficiency. p. 311.
5. PLEADING.—*Motions to Strike Out.—Relevancy.*—A pleading incapable of amendment so as to make it germane to the issues, may be rejected on motion. p. 312.
6. PLEADING.—*Relevancy.*—A pleading that has no substantial relation to the controversy is irrelevant, but if it may be amended so as to make it germane it can be demurred to, but cannot be stricken out on motion. p. 312.
7. CONTRIBUTION.—*Sheriff's Sales.—Tax Sales.—Cross-Complaints.—Striking Out.*—In a suit for contribution by the representative of a redemptioner from sheriff's sale of several parcels of land sold in a body, some of which parcels were owned by such redemp-

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tioner, and some by others, the complaint alleging that defendants were asserting claims to such redeemed parcels, and that their claims were inferior to those of such redemptioner, a cross-complaint alleging that the cross-complainant purchased the parcels in controversy at a tax sale prior to such sheriff's sale and had a tax deed therefor, is germane to the issues, and should not be stricken out on motion. p. 313.

8. **TAXATION.—Ditch Liens.—Tax Liens.—Superiority of.**—A tax lien is superior to a ditch assessment lien, a tax deed ordinarily giving to the grantee a fee simple title, subject only to claims by the State, of which a ditch assessment lien is not one p. 313.
9. **DEEDS.—Tax Sales.—Presumptions.—Liens.**—A tax deed is presumed to be legal and to vest in the grantee an absolute title in fee simple; but if it be illegal, it, nevertheless, constitutes a lien for the amount paid. pp. 313, 314.
10. **DEEDS.—Legal.—Equitable.—Merger.—Tax Sales.**—The holder of a tax deed who afterwards receives a conveyance of the land from the owners may, when equity requires it, enforce his rights under the tax sale, since equity keeps the tax lien alive to protect his rights. p. 314.
11. **APPEAL.—Briefs.**—A brief, though imperfect, presenting the points to be decided, is sufficient. p. 314.

From Allen Circuit Court; *Joseph W. Adair*, Special Judge.

Suit by Charles W. Branstrator, as administrator with the will annexed of William Branstrator, against Thomas E. Ellison and others. From a decree for plaintiff, defendants appeal. *Reversed.*

S. R. Alden and *Thomas E. Ellison*, in *pro. per.*, for appellants.

Olds & Doughman, for appellee.

HADLEY, C. J.—By this action appellee, Charles W. Branstrator, administrator with the will annexed of the estate of William Branstrator, deceased, sought to enforce a lien for contribution against certain parcels of land described in the complaint. The complaint is in two paragraphs, both containing the same general averments, but applying to separate parcels of land. By the averments of these paragraphs it appears that prior to 1887 a ditch had

been established which affected all of said lands; that the lands referred to in the first paragraph were in separate parcels but contiguous. These parcels we shall refer to, for brevity, as A and A", and the lands in the second paragraph shall be designated as B and B".

At the time of the establishment of the drain and the assessments thereunder, A and A" were standing on the tax duplicate in the name of Robert Norton, and both of said parcels were assessed as one tract, and B and B" were also, at that time, on the tax duplicate in the name of Robert Norton, and they were assessed as one parcel; that in fact, at said time, appellee's testator was the owner of both A" and B", and so continued the owner until his death after the establishment of the drain, and the sale and redemption hereinafter described; that on December 10, 1887, such proceedings were had in the Superior Court of Allen County, that a judgment was rendered foreclosing the ditch assessments levied upon each of said parcels of land, and ordering said lands to be sold by the sheriff, as provided by the statute. On February 11, 1888, all of said lands were sold by the sheriff, under said decree, to appellant Thomas E. Ellison, A and A" being sold as one parcel and B and B" sold as another. Thereafter, on February 2, 1889, appellee's testator, to protect his title in A" and B", redeemed from said sale, paying the full amount of the purchase price paid by appellant Thomas E. Ellison to the clerk of the circuit court, together with the costs and charges; that appellant Thomas E. Ellison received and receipted for said money to the clerk of said court; that the amounts so paid for the redemption of said tracts of land were \$521.95 and \$311.35, respectively; that by means of said redemption, appellee's testator thereby acquired a lien upon those parcels not owned by him, being parcels A and B, for their proportionate share of said sum so paid out for their redemption. It is averred that said appellant claims to have some title to, interest in, or lien upon said real estate; but

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whatever title to, interest in, or lien upon the land which said appellant has, or claims to have, is junior to the lien and rights of appellee, and casts a cloud upon the title, interests and rights of appellee, and he is made party to answer to such interest. Prayer for foreclosure of his lien and the sale of the premises.

This is the second appeal of this case. See *Ellison v. Branstrator* (1905), 34 Ind. App. 410. In the former appeal the complaint was held insufficient for lack of certain averments. The complaint now before us has been amended to meet these objections. The former opinion has a particular recital of the averments of the complaint, and as such averments are the same in the complaint now before us we have omitted many portions of said complaint from our statement. It is objected to the complaint that it

1. is still insufficient. It is urged that the averment, that said claims of said appellant are junior to the interest of appellee, is not equivalent to averring that such claims are inferior. There is no virtue in this contention. The averment that the lien is junior to the lien asserted, is a sufficient averment that it is inferior to such lien. *Murdock v. Ford* (1861), 17 Ind. 52; *Holmes v. Bybee* (1870). 34 Ind. 262; *McKernan v. Neff* (1873), 43 Ind. 503; *Hosford v. Johnson* (1881), 74 Ind. 479.

It is also urged that the complaint is insufficient, for the reason that it does not aver a demand for repayment before bringing the suit. This is not necessary. The stat-

2. ute provides that where one redeems from sale property in which he holds an interest, but does not own the whole he shall have a lien on the several shares of the other owners for their respective shares of redemption money. §812 Burns 1908, §769 R. S. 1881. When a redemption is made under this section, the redemptioner holds his lien in the nature of an assignee of the original lien holder. The lien is not removed but continued, and is enforceable without further demand, at any time after the

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expiration of the time for redemption by other parties in interest. *Gibson v. Crehore* (1827), 5 Pick. (Mass.) 146. Other objections urged against the complaint were settled in the former appeal. Each paragraph of the complaint is sufficient.

To the complaint appellants filed four paragraphs of answer, each of which, except the fourth, which was a general denial, went out on a demurrer or a motion to strike

3. out. Neither of said rulings is assigned as error, and no question is here presented thereon. Appellants then filed a cross-complaint in three paragraphs, which was afterwards superseded by an amended and supplemental cross-complaint in three paragraphs. This amended cross-complaint made William McNair a party defendant, to whom summons was issued, and he appeared by guardian *ad litem*, and filed a separate motion to strike out said cross-complaint. Appellee also filed a separate motion to strike out said cross-complaint. The motion of each, the appellee and McNair, was joint as to all the paragraphs of said cross-complaint. Each of said motions was sustained by the court and said cross-complaint was stricken out. These rulings of the court are assigned as error. Since each of said motions to strike out was a joint motion as to all the paragraphs, if either of said paragraphs was sufficient to withstand the motion, the court's ruling thereon was erroneous. *Board, etc., v. Nichols* (1894), 139 Ind. 611; *Baum v. Thoms* (1898), 150 Ind. 378, 65 Am. St. 368.

The only proper ground stated in each of said motions ~~was~~ that the facts set out in said cross-complaint were not germane to the issue and were irrelevant. Other

4. grounds were stated, going to the sufficiency of the pleading. We do not consider this question. A motion to strike out a pleading does not raise the question of its sufficiency. *Port v. Williams* (1855), 6 Ind. 219; *Hart v. Scott* (1907), 168 Ind. 530; *Burk v. Taylor* (1885), 103 Ind. 399.

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If a pleading is so palpably irrelevant that it is manifest that it could not be amended so as to make the facts therein stated in anywise germane to the controversy, it may

5. be rejected on motion. *Hart v. Scott, supra*, and cases cited; *Guthrie v. Howland* (1905), 164 Ind. 214, and cases cited. In the case last cited the court, quoting from 20 Ency. Pl. and Pr., 988, said: "A motion to strike out, like a motion to dismiss, will reach formal defects only and will not be allowed to take the place of a demurrer. The sufficiency of a pleading in matters of substance must be tried on demurrer, and not on a motion to strike out." In the case of *McCoy v. Stockman* (1897), 146 Ind. 668, the court said: "Even though the cross-complaint stated no cause of action against appellants, that circumstance furnished no ground for striking it out. It is well established in this State that it is error to strike out a complaint on the ground that it does not state facts sufficient to constitute a cause of action. *Port v. Williams* [1855], 6 Ind. 219; *State, ex rel., v. Newlin* [1879], 69 Ind. 108; *Indianapolis Piano Mfg. Co. v. Caven* [1876], 53 Ind. 258; *Fletcher v. Crist* [1894], 139 Ind. 121. The reason of the rule is, that if the facts stated are not sufficient to constitute a cause of action the plaintiff has a right to amend his complaint, so that it will state a cause of action. This he could not do if the pleading were stricken out. The same rule applies to a cross-complaint." And this is quoted with approval in the case of *Guthrie v. Howland, supra*.

A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action. *Clark v. Jeffersonville, etc., R. Co.* (1873), 44 Ind. 248:

6. *Seward v. Miller* (1852), 6 How. Prac. 312. A pleading, however, which is so framed that it does not set up a cause of action or a valid defense, as the case may be, but which states facts that tend to, and might, by proper averment, constitute such cause of action or defense, will not be stricken out as irrelevant, but may be demurred to.

Clark v. Jeffersonville, etc., R. Co., supra; Guthrie v. Howland, supra; Atkinson v. Wabash R. Co. (1896), 143 Ind. 501.

The facts averred in the first paragraph of the amended cross-complaint show that appellant Ellison purchased the lands, against which appellee is asserting his lien, at

7. a tax sale prior to the redemption of said land by appellee's testator, but subsequent to the sale from which such redemption was made; that no redemption had been made from said tax sale and that said appellant had received a tax deed to the same; that at the time he so purchased said land at said tax sale he had no interest in it, except by the purchase at sheriff's sale from which appellee's testator redeemed, and which act forms the basis of appellee's claim. This certainly was relevant to the controversy. Appellee is asserting a lien against the land owned by said appellant. Appellee avers that said appellant has, or claims to have, some title or interest in said land, but that such title or interest is junior to appellee's claim. By said appellant's first paragraph of cross-complaint he asserts a title to said lands by virtue of a tax deed, and by his averments shows that this title is paramount to the lien of appellee; that the lien that appellee is asserting is a cloud upon his (said appellant's) title, and he asks the court for a decree quieting his title against the very lien appellee is seeking to enforce.

The tax lien was superior to the ditch-assessment lien, and when said appellant acquired the tax lien, and thereupon a deed, he became vested with an absolute estate in fee

8. simple, subject only to claims of the State for taxes, liens or encumbrances. §10379 Burns 1908, Acts 1891, p. 199, §205.

The ditch assessment here is not a claim or lien of the State. If the tax sale was legal, and it is presumed to

9. be so, and appellee's testator failed to redeem therefrom, and said appellant thereby obtained title un-

der the statute, appellee's lien for contribution on the land thus acquired became thereby extinguished. If the tax sale was illegal or invalid, said appellant was still entitled to have his tax lien for the amount expended ascertained, and have it declared a superior lien. *McCollum v. Uhl* (1891), 128 Ind. 304; *Allen v. Rice* (1897), 16 Ind. App. 572.

That he afterwards received conveyances of the lands from persons holding legal title at the time of the tax sale.

would not affect his position in a case like the present, since equity would keep his lien alive to protect his rights. *Boos v. Morgan* (1892), 130 Ind. 305; *Chase v. Van Meter* (1895), 140 Ind. 321.

The tax title, properly averred, would be a good defense to appellee's claim, and would entitle said appellant to have his title quieted against it. The court therefore

erred in sustaining the motions to strike out the amended and supplemental cross-complaint. Other questions have been raised, or attempted to be raised, some of which are not presented in such a manner as to entitle them to consideration. Others may not arise on a subsequent trial, and therefore are not considered.

Judgment reversed, with instructions to overrule the motion to strike out the amended cross-complaint and such other proceedings, as the rights of the parties demand, not inconsistent with this opinion.

ON PETITION FOR REHEARING.

HADLEY, C. J.—Upon his petition for a rehearing, appellee earnestly insists that the brief of appellant Ellison is not in conformity with rule twenty-two of this court,

and therefore no question is presented on the ruling of the court on the motion to strike out the first paragraph of said appellant's cross-complaint. The main point of objection of appellee to said appellant's brief is that it is

not concise, that it is confused, and that it does not present the various matters under proper headings.

We concede that said appellant's brief is not a model of conciseness, lucidity or arrangement, but it does present the points relied upon for reversal in such a manner that they may be ascertained and clearly understood. The pleadings and rulings of the court thereon are set out, and consideration of all the questions passed upon can be fully given by the court without reference to the record. The brief shows a good-faith effort to comply with the rules, and presents a substantial conformity thereto. For further reasoning on this point see *Indiana Union Traction Co. v. Heller* (1909), 44 Ind. App. 385.

Petition for rehearing denied.

ADAMS ET AL. v. MERRILL.

[No. 6,146. Filed June 25, 1908. Rehearing denied January 27, 1909. Transfer denied February 4, 1910.]

1. **DEEDS.—Granting Clause.**—A deed reciting that the grantor and his wife "convey and warrant" to the grantee a certain tract of land, conveys the fee-simple title to the grantee (§3958 Burns 1908, §2927 R. S. 1881), the words "heirs" and "assigns" being unnecessary (§3960 Burns 1908, §2929 R. S. 1881). pp. 320, 327, 328.
2. **DEEDS.—Granting Clause.—Limiting Scope of.**—The use of the words "convey and warrant" in the granting clause of a deed may be controlled by modifying and limiting words used in the habendum clause of such deed. pp. 320, 328.
3. **DEEDS.—Granting Clause.—Limiting.**—A deed by which the grantors "convey and warrant to Luzette Merrill [certain land], said Luzette Merrill * * * to have and to hold the use of the lands * * * during her natural life, and upon her death the absolute title in fee simple * * * shall vest in the heirs of the body of said Luzette Merrill" and that "in case said Luzette Merrill shall die without leaving any heirs of her body living at the time of her decease, then upon the death of said Luzette Merrill the title to one-third of said lands shall vest in Ira Merrill, the husband of said Luzette Merrill, and the title to the remaining two-thirds of said land shall vest in the heirs of the body of Martha K. Adams, sister of said Luzette Merrill," gives to Martha K. Adams, or, if dead, to her children, two-thirds of

- such land, and to the husband of Luzette Merrill one-third thereof, in the event of the death of Luzette Merrill leaving no living child. pp. 322, 323, 324, 325.
4. DEEDS.—*Construction.*—*Words.*—Courts will give effect to all of the words used in a deed, and give them their ordinary meaning when possible. pp. 323, 329.
 5. DEEDS.—*Remainders.*—*Limiting after Grant of Estate Tail.*—A valid remainder may be limited after the grant of an estate tail (§3994 Burns 1908, §2958 R. S. 1881). p. 323.
 6. DEEDS.—*Remainder with Double Aspect.*—A deed may provide, on the happening of a designated contingency, for the gift of a remainder in fee to certain persons, and to others upon the failure of the happening of such contingency. p. 323.
 7. WORDS AND PHRASES.—“*Heirs of the Body.*”—*Deeds.*—The words “heirs of the body,” as used in a deed giving certain land to a daughter and upon her death to her children and “heirs of the body” of said daughter then living, import children. p. 324.
 8. DEEDS.—*Remainder to Children.*—*Shelley's Case.*—A deed giving to the grantors' daughter a life estate, remainder to her children and “the heirs of the body” of such daughter then living, gives a vested remainder to such children by purchase and not by descent. p. 325.
 9. DESCENT AND DISTRIBUTION.—*Contingent Remainder.*—*Adopted Children.*—An adopted child takes the interest of its adopting parents in a contingent remainder of land. p. 325.
 10. ESTATES.—“*Property.*”—*Statutes.*—The word “property,” as used in §1356 Burns 1908, §1285 R. S. 1881, providing that real “property” shall include “lands, tenements and hereditaments,” includes every species of title, inchoate or complete, and every right which lies in contract, executory or executed. p. 326.
 11. DEEDS.—“*Children.*”—“*Heirs of the Body.*”—*Adopted Child.*—An adopted child takes no title under a deed to his adoptive mother and her “children” and the heirs of her body living at her death. p. 326.
 12. DESCENT AND DISTRIBUTION.—*Adopted Children.*—Adopted children inherit the same as other children. p. 326.
 13. DEEDS.—*Warranty.*—“*Heirs.*”—At the common law the word “heirs” was necessary to a deed in granting an absolute title, the failure to use which resulted in the creation of a life estate. p. 328.
 14. DESCENT AND DISTRIBUTION.—*Heirs.*—*Living Persons.*—A living person has no heirs. p. 329.

From Steuben Circuit Court; *Joseph W. Adair*, Special Judge.

Suit by Martha K. Adams and others against Alvah B.

Merrill. From a decree for defendant, plaintiffs appeal.
Reversed.

Brown & Carlin and Frank M. Powers, for appellants.

Walter Olds and Cyrus Cline, for appellee.

MYERS, J.—The appellants by their complaint and the appellee by his cross-complaint sought to quiet title to certain real estate in Steuben county. The case involves the construction of a certain deed of conveyance of said real estate, and the question is presented by the assignment of errors based on the action of the court in overruling appellants' demurrer to the first paragraph of the cross-complaint, and its ruling sustaining the appellee's demurrer to the second paragraph of the second amended complaint.

The plaintiffs Martha K. Adams, William H. Adams, her husband, and their three children, Mabel L. Adams, Earl B. Adams and Myra P. Adams, alleged, in substance, that Lewis Barnard was the owner, on April 18, 1877, of the real estate described, and on that day he and his wife, Hattie Barnard, executed to Luzette Merrill the deed in controversy, portions of which are as follows:

“This indenture witnesseth that Lewis Barnard and Hattie Barnard, his wife, both of Steuben county, in the State of Indiana, convey and warrant to Luzette Merrill, of Steuben county, in the State of Indiana, for the sum of \$500, the following real estate in Steuben county, in the State of Indiana, to wit: * * * By this conveyance, said Luzette Merrill is to have and to hold the use of the lands above described during her natural life, and upon her death the absolute title in fee simple to the above-described lands shall vest in the children and heirs of the body of said Luzette Merrill. In case said Luzette Merrill shall die without leaving any heirs of her body living at the time of her decease, then upon the death of said Luzette Merrill the title to one-third of said lands shall vest in Ira Merrill, the husband of said Luzette Merrill, and the title to the remaining two-thirds of said land shall vest in the heirs of the body of Martha K. Adams, sister of said Luzette Merrill.”

At the time of the execution of the deed in question the grantor was an old man, in poor health, and Luzette Merrill and Martha K. Adams were his only children then living. The conveyance was made and intended by the grantor, and was accepted by the grantee, as a gift in consideration of love and affection. On the same day Lewis Barnard executed to Martha K. Adams a deed conveying other real estate owned by him. The consideration of \$500, mentioned in the deed to Luzette Merrill, was not paid, nor was any part of it paid, nor was it intended by the parties at the time of the execution of the deed that said pecuniary consideration or any part of it should be paid. The land so conveyed to Luzette Merrill was at the time of the conveyance of the fair cash value of \$10,000. The deed was duly recorded November 13, 1877. The grantor and his wife, who joined in the conveyance, were divorced on his petition to the Steuben Circuit Court on February 6, 1878, and Lewis Barnard, the grantor, died intestate, December 17, 1883, leaving Luzette Merrill and Martha K. Adams his only children and heirs at law. Ira Merrill, named in the deed, was the husband of Luzette Merrill at the time of the execution of the deed and thereafter until February 7, 1898, when he died intestate. At the date of the deed Luzette Merrill had a daughter, her only child, Belle Merrill, born August 5, 1876, who died intestate October 5, 1894, leaving no children or lineal descendants, and she never was married. Luzette Merrill died intestate May 28, 1902, leaving no children or heirs of her body surviving her, and she never married after the death of Ira Merrill. On September 9, 1896, on the petition of Ira Merrill and Luzette Merrill, it was adjudged and decreed by the Steuben Circuit Court that John Alva Bolin and his sister, Lula May Bolin, be, and by said judgment and decree they were, adopted by Ira Merrill and Luzette Merrill as heirs at law, and their names were changed to Alva B. Merrill and Lula B. Merrill. Said adopted heirs were not related by consanguinity to Lewis Barnard, Lu-

zette Merrill nor Ira Merrill. Lula B. Merrill died intestate December 20, 1900, unmarried and leaving no children nor lineal descendants. Said Alva B. Merrill was made a defendant, and he is the sole appellee here. It was alleged that he was claiming some interest in the real estate under and by virtue of said adoption, and not otherwise, which claim was alleged to be adverse to the claim of the appellants, unfounded, and a cloud upon their title. It was further shown that the appellant William H. Adams, at the time of the execution of the deed, was, and he still continued to be, the husband of appellant Martha K. Adams, mentioned in the deed, and is still living, and the other appellants here, Mabel L. Adams, Earl B. Adams and Myra P. Adams, were the only children and "heirs of the body" of Martha K. Adams. Mabel L. Adams was born September 7, 1876, before the execution of the deed, and Lewis Barnard, the grantor, well knew, at the time of the execution of the deed, of the existence of Belle Merrill and Mabel L. Adams. Earl B. Adams was born October 29, 1878, and Myra P. Adams was born May 12, 1883. None of the persons mentioned in the deed and none of the parties to this cause have ever conveyed or alienated or attempted to convey or alienate said lands or any part thereof. Luzette Merrill at the time of said conveyance entered into possession of the lands under and by virtue of the conveyance, and she held possession thereof continuously until her death, when the appellants entered into possession of the lands, and ever since they have been, it was alleged, "the owners in fee simple of the above-described real estate." The cross-complaint of the appellee set forth the facts without essential difference from the averments of the complaint.

It is contended, on behalf of the appellee, that by the premises of the deed the grantor conveyed to Luzette Merrill all the title he had, and she thereby took an absolute title in fee; that the language of the habendum is repugnant to the granting clause, and is void; that if the deed

shall not be so construed, the words "children and heirs of the body," in the deed, designate two classes of persons, and the word "children" carries the title to the appellee, an adopted child, living at the death of Luzette Merrill, otherwise, the words "heirs of the body" must prevail, and by virtue of our statute the deed conveyed the fee simple absolute to Luzette Merrill, and the title passed from her to the appellee by descent.

It is true that by virtue of §3958 Burns 1908, §2927 R. S. 1881, the deed, in the absence of the disposing provisions following the description of the land, referred to in

1. argument as the habendum, would have been sufficient to transfer the title in fee simple to Luzette Merrill, with full covenants. We are therefore to consider what effect, if any, should be ascribed to those provisions following the description. The statute (§3960 Burns 1908, §2929 R. S. 1881) also provides: "It shall not be necessary to use the words 'heirs and assigns of the grantee,' to create in the grantee an estate of inheritance; and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed."

It is proper to consider whether the grantor, who did not use the words "heirs and assigns" in the deed, expressed his intention to convey any estate less than a fee

2. simple absolute to the first taker. Under the statutes a grantor may use the words "convey and warrant" without using the words "heirs and assigns of the grantee," and yet may effectually express "in the deed," though after the description of the land, as in this deed, his intention to convey an estate less than an estate of inheritance to the first taker. In the case of *Prior v. Quackenbush* (1868), 29 Ind. 475, the deed executed in 1837 contained the words "heirs and assigns" of the grantee, and therefore the deed, without more words, would have been sufficient to pass title in fee simple to the grantee; but effect was given to a qualifying clause at the close of the deed, and the first taker was

held to have received a life estate with remainder to two persons named in the qualifying clause, which defined the sense in which the word "heirs" in the preceding portion of the deed was to be taken, and restricted it to the two persons so named in the qualifying clause. There was no conflict between the provisions of the deed, but the meaning of one portion was defined by another portion. In the case of *Carson v. McCaslin* (1878), 60 Ind. 334, Abel and his wife by their deed, executed in 1864, granted, bargained, sold and conveyed to "Hervey McCaslin and his heirs and assigns forever" real estate described, "to be held by said Hervey McCaslin for and during his natural life, and to Sarah McCaslin (his now wife) if she be living at the death of said Hervey McCaslin, and to her heirs and assigns in fee simple; and if she be not living at the death of said Hervey McCaslin, then to the heirs and assigns of said Hervey McCaslin forever." The court, considering the deed as a whole, held that there was not "such a repugnance or contradiction between the premises of the deed in question and the habendum as rendered the latter void;" that Hervey McCaslin was to take the land for life at all events, and his heirs the fee, if he should survive his wife, but if she should survive him the fee was to be vested in her.

In the case of *Edwards v. Beall* (1881), 75 Ind. 401, the grantors by deed executed in 1869 in its granting part did "convey and warrant" to Celestine Beall and John Beall, her husband, for a sum stated, certain real estate described, to be held by said Celestine as her own property, the husband "having the possession thereof during his lifetime; said possession to return to Mrs. Beall if she survives her husband." It was held that the wife took an estate in fee simple subject to a life estate in the husband.

In the case of *Doren v. Gillum* (1893), 136 Ind. 134, by the terms of the deed executed in 1892, the grantors "convey and warrant to Levi Hubbard and Margaret Hubbard,

* * * for the sum of," etc., certain real estate described, "to have and to hold the same during their natural lives and each of their natural lives, and then to descend to William H. Hubbard and the heirs of his body." It was urged there, as here, that by the words "convey and warrant," title in fee simple was passed, and that "the habendum totally contradicts and is repugnant to the estate granted in the premises," and hence that the premises govern and the habendum is void." But the court held that only a life estate went to Levi and Margaret Hubbard and each of them, and that William H. Hubbard took by purchase a vested remainder.

In the case of *Evans v. Dunlap* (1905), 36 Ind. App. 198, the deed executed in 1860 proceeded: "Jacob Evans, of Madison county, in the State of Indiana, for \$1,000 conveys and warrants to James Evans, of Madison county, in the State of Indiana, the following described real estate, situated in Madison county, in the State of Indiana: * * * To have and to hold the same during his natural lifetime." It was held that a life estate only was conveyed to the grantee. See, also, *Tinder v. Tinder* (1892), 131 Ind. 381; *Welch v. Welch* (1899), 183 Ill. 237, 55 N. E. 654; *Williams v. Hedrick* (1899), 96 Fed. 657, 37 C. C. A. 552.

Turning to the deed in the case at bar, it is plain, under the cases before cited, that after the use of the words "convey and warrant to Luzette Merrill," in the beginning

3. portion of the deed, it was within the power of the grantor, in the portion following the description, to define the estate granted to Luzette Merrill as a life estate only, and to provide for any valid remainder. By legitimate and proper interpretation of that portion of the deed following the description of the land, the meaning, which is to be our guide, is that upon the termination of the life estate, if Luzette Merrill should leave any heirs of her body living at the time of her decease, the title in fee simple should vest in her children and heirs of her body so left living at her

decease; but if she should die without leaving any heirs of her body then living, the title to one-third of the lands should vest, at the death of Luzette Merrill, in Ira Merrill, her husband, and the title to the remaining two-thirds of the land should vest, at the death of Luzette Merrill, in the heirs of the body of Martha K. Adams, sister of Luzette Merrill.

We are to seek to give effect to every word in the deed according to the intention of the parties (*Evans v. Dunlap, supra; Goodpaster v. Leathers* [1890], 123 Ind. 121;

4. *Tinder v. Tinder, supra; Booker v. Tarwater* [1894], 138 Ind. 385, 394), and therefore we must not reject arbitrarily the legitimate meaning of the word "children" in the connection in which it is used in the deed. Our statute

contemplates that a valid remainder may be

5. limited after what would be an estate tail at common law. §3994 Burns 1908, §2958 R. S. 1881. See *Moore v. Gary* (1897), 149 Ind. 51.

In the deed before us, unless Luzette Merrill should leave surviving her heirs of her body alive at the time of her death,

no estate was to go to the children and heirs of her

3. body, but in the absence of heirs of her body alive at her death the title absolute was to go, one-third to Ira Merrill and two-thirds to the heirs of the body of Martha K. Adams. In 2 Washburn, Real Property (5th ed.), p. 625, it is said: "Notwithstanding a remainder limited after a remainder in fee would be void, as has been often repeated, yet two remainders may be so limited, though

6. each a fee, as to be good, provided this is so done that only one is to take effect, the one being a substitute for, and not subsequent to, the other. The consequence is, that, if the first takes effect and becomes vested, the other at once becomes void. Such limitation is said to be of a fee with a double aspect. A case illustrative of this proposition is that of *Luddington v. Kime* [1697], 1 Raym. 203, where the devise was to A. for life; and if he had male

issue, then to such issue and his heirs; but if A. died without issue male, then to T. B. in fee. Here are two remainders contingent in their character, and both in fee, dependent upon the same particular estate, and to take effect, if at all, upon the determination of that estate; and only one of these can take effect. If A. has issue, the remainder vests at once in such issue, and defeats the limitation of T. B. altogether. On the other hand, if A. dies without issue, T. B.'s remainder at once vests in him, and takes effect as a substitute for the other; neither is by its terms to wait until the other shall have once taken effect, and afterwards been determined."

The limitation to the children and heirs of the body of Luzette Merrill not having taken effect at the termination of the particular estate, she having died without

3. leaving any heirs of her body living at the time of her decease, the other contingent limitation upon the same particular estate took effect, as a substitute, immediately upon the death of Luzette Merrill. Whether it is considered that Luzette Merrill took what at common law would have been an estate tail, or a determinable fee, in either case it was limited to the children and heirs of her body living at her decease, and it must be kept in mind that a valid contingent remainder might be limited over to take effect upon the termination, under the circumstances mentioned in the deed, of the first estate granted; that is, a contingent remainder in fee simple was limited to Ira Merrill and to the heirs of the body of Martha K. Adams. Goodwin, Real Property, pp. 32, 43.

The contingency upon which the remainder was to vest in Ira Merrill and the heirs of the body of Martha K. Adams, was the event of the failure of issue. The phrase,

7. "heirs of the body," was used consistently throughout the deed in the sense of children, issue of the body. The two-thirds part of the land was to "vest in the heirs of the body of Martha K. Adams, sister of said Luzette Mer-

rill." The phrase, "heirs of the body," was here used as *descriptio personarum* of the heirs apparent of the body of Martha K. Adams. The remainder was to vest in them upon the death of Luzette Merrill without heirs of her body then living. Of the two modes recognized by law for the

8. acquiring of estates, "purchase" and "descent," they were to take by the former, and not by the latter.

The rule in *Shelley's Case* (1581), 1 Coke *94, has no application here. The three children of Martha K. Adams were the heirs of the body of Martha K. Adams, within the meaning of the grantor. They were living and capable of taking at the time the estate in remainder must vest,

3. the time of the termination of the particular estate.

Under our statute there was no necessity for the use of the words "heirs and assigns" to create an estate of inheritance in these three children. So, also, there was no need of the use of these words to create a like estate in Ira Merrill. See *Chamberlain v. Runkle* (1902), 28 Ind. App. 599. We therefore conclude that the appellants, Mabel L. Adams, Earl B. Adams and Myra P. Adams, are entitled to have their title in fee simple to the two-thirds part of the lands in question quieted.

Before the termination of the particular estate of Luzette Merrill, Ira Merrill, her husband, died intestate, one of the owners by purchase, as we have seen, of the con-

9. tingent remainder in fee simple, and by applying to that interest the rule that "where the person is ascertained who is to take the" contingent "remainder, if it becomes vested, and he dies, it will pass to his heirs." 2 Washburn, Real Property (5th ed.), p. 640. See, also, *Hall v. Brownlee* (1905), 164 Ind. 238; *Wendell v. Crandall* (1848), 1 N. Y. 491; *Hicks v. Pegues* (1852), 4 Rich. Eq. 413. In 4 Kent's Comm. (14th ed.), *261, it is said "that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an inter-

est, where the person to take is certain, are transmissible by descent, and are devisable and assignable." *Cummings v. Stearns* (1894), 161 Mass. 506.

Section 2990 Burns 1908, §2467 R. S. 1881, provides that "the real and personal property of any person dying intestate shall descend to his or her children in equal 10. proportions." Under §1356 Burns 1908, §1285 R. S. 1881, the phrase "real property" includes lands, tenements and hereditaments, including incorporeal hereditaments. "The word 'property,' as used in this statute, as applicable to lands, includes every species of title, inchoate or complete, and embraces the rights which lie in contract, whether executory or executed." *Burt v. Hoettinger* (1867), 28 Ind. 214, 218.

Ira Merrill left surviving him his widow, Luzette Merrill, and the appellee, Alvah B. Merrill, an adopted son of both Ira Merrill and Luzette Merrill. The adoption took place after the death of the daughter, Belle Merrill, who was living at the date of the deed, and who died after the death of the grantor. This adopted child cannot be regarded as within the meaning of the grantor in the use of the 11. words "the children and heirs of the body of said Luzette Merrill," or the words "any heirs of her body living at the time of her decease," in the deed, but he was the heir of Ira Merrill and Luzette Merrill by virtue of his adoption. The statute (§870 Burns 1908, Acts 1883, p. 61) provides that "from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother." And it has been held that an adopted child 12. inherits from the adopting parents the same as their own child. *Krug v. Davis* (1882), 87 Ind. 590; *Bray v. Miles* (1899), 23 Ind. App. 432. Therefore, whatever inheritable right existed in the adopting parents descended to

the adopted son on their death. And as Luzette Merrill died leaving no heirs of her body living, and, as we have seen, Ira Merrill died leaving an interest in the lands in question which would pass to his heir—the adopted son—we are therefore of the opinion that appellee, Alvah B. Merrill, is entitled to the undivided one third of the lands in fee simple, and that his title thereto should be quieted.

Judgment reversed, with instructions to proceed in accordance with this opinion.

Rabb, C. J., Comstock, Hadley and Watson, J.J., concur.

Roby, J., absent.

ON PETITION FOR REHEARING.

MYERS, J.—In support of appellee's petition for a rehearing, counsel earnestly and ably argue that the limitation in that portion of the Barnard deed following the

1. description of the real estate should be held void, because of the repugnancy between it and the premises of the deed. They also very respectfully contend that in our original opinion and in *Evans v. Dunlap* (1905), 36 Ind. App. 198, we have abrogated the rule stated in the cases of *Chamberlain v. Runkle* (1902), 28 Ind. App. 599, and *Lamb v. Medsker* (1905), 35 Ind. App. 662. In view of the apparent earnestness of counsel in these matters, we have taken the time carefully to reconsider this case, and, in the hope of making ourselves the better understood, have concluded to add the following observations, although they may appear to be elementary.

It will be proper, as preliminary to what we shall hereafter say, to call attention to the fact that in the case of *Evans v. Dunlap*, *supra*, as in this case, the granting clause was expressed in general terms, while in the two other cases just cited the granting clause contained words of limitation. Keeping in mind this difference between the cases mentioned may result in a better understanding of our theory of this case.

Before the enactment of §§3958 Burns 1908, §2927 R. S. 1881, on which counsel base their claim, it was necessary, in order to convey an estate in fee simple, to insert the

13. word "heirs," or other words of limitation, in the premises of the deed, if words of limitation were inserted in the habendum, and it was sufficient to insert words of purchase only in the premises, leaving to the habendum its proper office of the expression of words of limitation. The purpose of the habendum is to limit and define the estate or amount of interest of ownership in the

1. premises granted, as for life or in fee, etc. It was usual, however, to insert in the premises, in connection with the words of grant, the estate or quantity of ownership. If the granting part of the deed contain proper words of limitation, the habendum may be dispensed with entirely; but if the latter be used and the limitation therein be repugnant to the limitation in the premises it will be treated as having no validity or effect. When, however, the grant is indefinite because of its generality in respect to the estate in the lands conveyed, it may be defined, qualified and controlled by the habendum. So the habendum is useful only when the words of grant leave the subject of the extent of ownership open to explanation. A simple grant to a person named, without any particular words of limitation in the premises, leaves the extent of ownership open to explanation. *Evans v. Dunlap, supra*. Such a grant, indefinite because of its generality, being without limitation either in the premises or in the habendum, would be construed at common law to mean a grant for life only. *Hadlock v. Gray* (1886), 104 Ind. 596, 599; *Lamb v. Medsker, supra*; *Chamberlain v. Runkle, supra*. Our statutes (§§3958-3960 Burns 1908, §§2927-2929 R. S. 1881), besides furnishing short forms for deeds of conveyance, make

2. it unnecessary to use the words "heirs and assigns of the grantee" to create an estate of inheritance, but if a lesser estate is intended by the grantor "it shall be so ex-

pressed in the deed." (Our italics.) A deed of conveyance, which if made before the statute would create an estate for life by reason of the words of grant being thus general and indefinite, and there being no words of limitation either in the granting clause or in the habendum, will under the statute create in the grantee an estate of inheritance, the presumption of law in the former case being that the grantor intended to create an estate for life; whereas under the statute, an estate of inheritance. But notwithstanding the employment of such general words of grant in the premises, the grantor, under the statute, as before its enactment by appropriate words of limitation in the habendum, or by subsequent appropriate expressions "in the deed," may define the estate or amount of interest or ownership in the property granted.

It is true, as pointed out by counsel, that Martha K. Adams, being still in life, has no heirs of her body in the technical meaning of those terms; but we cannot

14. agree that the provision of the deed, that in the event of the death of Luzette Merrill, without any heirs of her body living at her decease, then, upon her death the title to two-thirds of the lands should vest in the heirs of the body of Martha K. Adams, must be treated as void. This language "does not designate those who shall take in indefinite succession, but it designates persons who shall take the remainder as soon as the life estate ends." *Haddock v. Gray, supra*. While it is not the purpose of construction to wrest the words of the instrument from

4. their settled legal meaning by resorting to evidence of language used by the parties and not inserted in their written contract, yet the court should seek the sense of the language actually employed, as the parties intended, and apply it in accordance with their intent, if such intent be not opposed to established principles of law. *Fountain County Coal, etc., Co. v. Beckleheimer* (1885), 102 Ind. 76; *Evans v. Dunlap, supra*; *Hummelman v. Mounts* (1882), 87

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Ind. 178. If possible, in accordance with established principles, in seeking the meaning of parties the court should proceed upon the theory that they did not intend any of the language employed by them to be absurd or meaningless, and did not propose to do a vain and useless thing. 3 Washburn, Real Property (6th ed.), §2271. The same author also says (§2267) that “comparatively few deeds are made in which there are not either recitals, exceptions, conditions, or reservations, as well as covenants respecting the title.”

Finding no reason to change our former conclusion reached in this case, the petition for a rehearing is overruled.

LEHMAN ET AL. v. THE STATE OF INDIANA, EX REL.
MILLER, ATTORNEY-GENERAL.

[No. 6,463. Filed May 12, 1909. Rehearing denied October 27, 1909. Transfer denied February 4, 1910.]

1. TREATIES.—*States.—Statutes.*—Treaties made by the federal government are superior to state laws. p. 334.
2. DESCENT AND DISTRIBUTION.—*Regulation of.—Aliens.—Treaties.*—The power of the State to regulate the subject of descent and distribution of the property of aliens is subject only to constitutional restrictions, federal laws and treaties. p. 334.
3. DESCENT AND DISTRIBUTION.—*Aliens.—Powers of States.*—The State, in the absence of constitutional restrictions, federal laws, or treaty rights, may deny to aliens the privilege of inheriting lands, or it may grant such right under restrictions which to it may seem proper. p. 334.
4. STATUTES.—*Construction.—Giving Effect to Language.*—In the construction of a statute effect should be given to all of the language used, if possible. p. 335.
5. TREATIES.—*Switzerland.—Aliens.—Holding Property.*—By the treaty with Switzerland in 1855, in States where aliens were not granted a right to hold lands, time was given within which such aliens had the right to sell their lands and to withdraw the proceeds. p. 335.
6. ALIENS.—*Ownership of Lands.—Limitations.*—Under the Swiss treaty of 1855, an alien Swiss may acquire land in Indiana only by devise or descent, and then, can hold it only for five years, otherwise the land escheats to the State. pp. 335, 337.

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7. DESCENT AND DISTRIBUTION.—*Taking and Transmitting by Aliens*.—The power to take, and the power to transmit lands by descent are separate; and at the common law an alien could not take nor transmit, his right so to do being wholly statutory. p. 336.
8. WORDS AND PHRASES.—“*Hold*.”—*Real Property*.—The word “hold,” as applied to the title to real estate, imports the duration of the tenure of the estate. p. 336.

From Superior Court of Marion County (68,219); *Vinson Carter*, Judge.

Suit by the State of Indiana, on the relation of Charles W. Miller, Attorney-General, against Catherine Lehman and others. From a decree for plaintiff, defendants appeal. *Affirmed*

Edenharter & Mull, for appellants.

Charles W. Miller, Attorney-General, *C. C. Hadley* and *Charles Martindale*, for appellee.

COMSTOCK, P. J.—On June 7, 1904, appellee filed in the court below its second amended information to recover, under §3941 Burns 1906, Acts 1903, p. 184, of the appellants, and to quiet title to, certain real estate in the city of Indianapolis, which real estate was owned at the time of his death by John Lehman, who died intestate on July 21, 1894, a naturalized citizen of the United States and a resident of Marion county, Indiana, and who left surviving him certain heirs, all of whom were then, and such of them as are still alive and the descendants of those who are dead are, residents and citizens of the republic of Switzerland. A trial was had by the court, and a decree entered in favor of appellee.

The errors assigned and not waived challenge the correctness of the conclusions of law numbered one, two and three.

Section 3941, *supra*, or so much thereof as is necessary for the determination of the question here involved, is as follows: “All other aliens [other than those having declared their intention, etc., as provided in §3940 Burns 1908,

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Acts 1893, p. 377] may take and hold land by devise and descent only. and may convey the same at any time within five years thereafter, and no longer, and all lands so left and remaining unconveyed at the end of five years shall escheat to the State of Indiana.” It is claimed by appellants that §3941, *supra*, is in conflict with Article V of the treaty between the United States and the Swiss Confederation, ratified Nov. 8, 1855 (11 Stat. U. S., p. 587), which reads as follows: “The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament, or *ab intestate*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. * * * The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties shall fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated.”

The special findings may be summarized as follows: John Lehman, a native of Switzerland, on October 19, 1880, made application and became a citizen of the United States and of the State of Indiana, and from that date until his death he resided in Marion county, in said State. Said John Lehman became owner of certain property in the years 1881, 1883 and 1888, by deeds of conveyance. From the dates of said several conveyances, he continuously remained, and was at the time of his death, the owner in fee simple of said several pieces of real estate. He died intestate at Indianapolis, Indiana, July 21, 1894, leaving surviving him as his only heirs at law certain heirs (naming them). All of the defendants hereto were, at the time of the death of said John Lehman and have continuously thereafter remained and now are, residents and citizens of Switzerland. His estate was duly administered upon and the administrator discharged. The defendants are the sole and only heirs at law of said John Lehman, deceased. No part or portion of said real estate, nor any interest therein, has ever been conveyed by either or any of the defendants, or any other person, since the death of said John Lehman, but since the death of said John Lehman, his heirs, through an agent in Indianapolis, have been collecting and receiving the rents, income and profits from said real estate up to the time of the commencement of this suit, since which time they have been paid to a receiver heretofore appointed in this cause, and the defendants claim to be the owners of said real estate by inheritance from said John Lehman, deceased.

Upon said findings the court stated its conclusions of law, in substance, as follows: (1) That §3941, *supra*, is not in conflict with any provision of the treaty between the United States and Switzerland, ratified on November 8, 1855; (2) that the real estate has escheated to the State of Indiana for the common school fund; (3) that the claims of the defendants are a cloud upon the title of said State of Indi-

ana to the said real estate, and that the title of the State should be forever quieted and confirmed against the claims of the defendants.

Appellants insist that Article V of said treaty makes provision for two distinct classes of aliens, to wit: Those who are, by the laws of the state or canton, entitled to hold or inherit real estate, and those who, on account of being aliens, are not permitted to hold real estate. The treaty recognizes the right of either country to deny to foreigners the right to hold or inherit real estate; but, by the provisions of said treaty, where they do inherit, their rights are governed by the provisions relating to personal property, and not under the last clause thereof, which provides for a limitation such as the state or canton may establish.

Treaties are a part of the supreme law of the land. State laws must give way to treaties made by the federal government. 1 Lewis's Sutherland, Stat. Constr. (2d ed.), 1. §22; *Blythe v. Hinckley* (1900), 127 Cal. 431, 59 Pac. 787; *Adams v. Akerlund* (1897), 168 Ill. 632, 48 N. E. 454; *Scharpf v. Schmidt* (1898), 172 Ill. 255, 50 N. E. 182.

Subject to the provisions of the organic law of the State, if any, relating thereto, and the Constitution, laws and treaties of the United States, the state, through its

2. General Assembly, has full power to regulate the law of descent, and to determine whether aliens shall be permitted to hold real estate, and, if so, to what extent and under what circumstances.

The question in this case is whether the statute in question is in conflict with said treaty between the United States and the Swiss Confederation. We think it is

3. firmly settled, except so far as limitations have been placed on the inherent sovereignty of the states by treaty, that the state may deny aliens the privilege of inheriting lands; and it follows that when it grants it, it may annex to the grant any conditions which it supposes

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may be required by its interests or policy. *Donaldson v. State, ex rel.* (1906), 167 Ind. 553; *Mager v. Grima* (1850), 8 How. 490, 12 L. Ed. 1168; *Chirac v. Lessee of Chirac* (1817), 2 Wheat. 259, 4 L. Ed. 234; *Hauenstein v. Lynham* (1879), 100 U. S. 483, 25 L. Ed. 628; *Hanrick v. Patrick* (1886), 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Blythe v. Hinckley* (1901), 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557; *Wunderle v. Wunderle* (1893), 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

In construing statutes, "that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious

4. whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which would give it effect." 26 Am. and Eng. Ency. Law (2d ed.), 618.

In negotiating said treaty between the United States and the Swiss Confederation, the federal government, recognizing that states might not permit aliens to hold real

5. estate, provided that in such states where aliens are not "permitted to hold such property," "there shall be accorded to said heir, or other successor, such term as the laws of the state or canton will permit to sell property," and he shall be at liberty to withdraw and export the proceeds without any other charges than inhabitants of the country would pay.

A distinction is made in the treaty between the words "inherit" and "hold." The statute of 1881 in this State made a distinction between acquiring and holding

6. real estate. Acts 1881, p. 84, §1, §2967 R. S. 1881.

The title to the act was: "An act to authorize aliens to hold title to real estate, convey the same, etc." Said Section one provided: "Natural persons who are aliens, whether they reside in the United States or any foreign country, may acquire, hold and enjoy real estate," etc. In section one of the act of 1885, in controversy here (Acts

1885, p. 79, §3332 Burns 1894), it is provided "that all aliens residing in the State of Indiana who shall have declared their intention to become citizens of the United States, conformably to the laws thereof, may acquire and hold real estate in like manner as citizens of this State." Section two (§3333 Burns 1894) provides that "all other aliens may take and hold land by devise and descent only, and may convey the same at any time within five years," etc. A distinction is made between "acquiring," "taking" and "holding." A limitation on the taking or acquiring is made. An alien not residing in the State, and who has not made a declaration of citizenship, cannot take by purchase, but can take only by devise and descent. Such an alien can hold and convey only for a limited period of five years; at the end of which period the lands shall escheat. In this State aliens are thus entitled to inherit for a limited purpose and a qualified estate.

In the case of *Donaldson v. State, ex rel., supra*, it is pointed out that the power to take by descent and the power to transmit by descent are two separate and distinct

7. powers; that the alien at common law can neither take nor transmit title to real property by descent; that his power to do either is dependent upon the statutes of the state in which the real estate is situated.

There is a well-defined meaning to the word "hold" as applied to real estate. Its meaning in connection with the title to real estate is something different from the

8. mode of acquisition; it has to do with the duration or tenure of the estate. In the case of *Runyan v. Lessee of Caster* (1840), 14 Pet. *122, 10 L. Ed. 382, the Supreme Court makes this distinction and says: "The doctrine of the supreme court of Pennsylvania, in the case of *Leazure v. Hillegas* [1821], 7 Serg. & R. (Pa.) *313, is directly applicable to this case. The question then before the court was as to the right of the Bank of North America to purchase, hold and convey the land in question, and the court took the

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distinction between the right to purchase, and the right to hold lands, declaring them to be very different in their consequences; and that the right of a corporation in this respect was like that of an alien, who has power to take, but not to hold lands; and that although the land thus held by an alien may be subject to forfeiture, after office found, yet until some act is done by the government, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser; but he can convey no estate which is not defeasible by the commonwealth." See, also, *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.* (1887), 32 Fed. 22. In the case of *Wunderle v. Wunderle*, *supra*, the question had reference to a statute similar to the statute here under consideration, which accorded to nonresident aliens a period of three years to sell lands which might fall to them by descent, in which case a right, under a treaty between the United States and the German Empire, was set up as being in conflict with and superior to the statute. It was claimed that appellants took such an interest in the lands in controversy as they could hold until it was assailed in a direct proceeding instituted by the state. But the court held that, as the appellants had no power to take, in default of any competent heirs capable of inheriting, the land escheated to the state, distinguishing between the power to take and the power to hold.

Under the language of the third and fourth clauses of Article V of the treaty, referring to the power to hold, and the rights of Swiss aliens in the states of America in

6. respect to lands, there are three supposable cases with which the treaty has to deal: (1) States in which nonresident aliens may both inherit and hold. (2) States in which nonresident aliens may inherit but not hold. (3) States in which nonresident aliens may neither inherit nor hold. In the first place they shall have the same rights that they have in regard to personal property; that is to say, they shall have the right to transmit to their heirs by devise

or by descent; they may take possession by themselves or by parties acting for them; they may dispose of the land, paying no other charges than those which the inhabitants of the country are liable to pay; they shall have equal rights with the inhabitants of the country to the protection of the laws relating to probate and administration. The second and third cases are dealt with by the fourth clause of Article V, providing for states in which aliens could not be permitted to hold such property. The classification is based upon a disqualification to hold, and prescribes what shall be the rights of aliens in those states in which they are not permitted to hold. In respect to this clause, the Supreme Court of the United States, in the case of *Hauenstein v. Lynham*, *supra*, said that it was "left to the laws of the several states and cantons respectively to fix the limitation in this as in other cases." It is further said in the same case: "If a state or canton had a law which imposed a limitation in this class of cases, nothing more was necessary. If it had not such a law, it was competent to enact one, and until one exists there can be no bar arising from the lapse of time."

The law of Indiana grants precisely what the treaty guarantees: A right to have the inheritance and to hold it for a limited time for the purpose of sale and the withdrawal of the proceeds, and prescribes that if the privilege is not availed of within the term allowed by the act the estate shall escheat. Chief Justice Marshall, in the case of *Chirac v. Lessee of Chirac* (1817), 2 Wheat. 259, 4 L. Ed. 234, with respect to just such an act granting a defeasible term to alien heirs, said: "But to this enacting clause is attached a proviso that whenever any subject of France shall, by virtue of this act, become seized in fee of any real estate, his or her estate, after the term of ten years be expired, shall vest in the state, unless the person seized of the same shall, within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof some citizen of this or some other of the United States of America. The heirs of John Baptist

Chirac, then, on his death, became seized of his real estate in fee, liable to be defeated by the nonperformance of the condition in the proviso above recited. The time given by the act for the performance of this condition expired in July, 1809, four months after the institution of this suit. It is admitted, that the condition has not been performed; but it is contended that the nonperformance is excused, because the heirs have been prevented from performing it by the act of law and of the party. The defendant, in the court below, has kept the heirs out of possession, under the act of the State of Maryland, so that they have been incapable of enfeoffing any American citizen; and having been thus prevented from performing one condition, they are excused for not performing the other. Whatever weight might be allowed to this argument, were it founded in fact, its effect cannot be admitted in this case. The heirs were not disabled from enfeoffing an American citizen. They might have entered, and have executed a conveyance for the land. Having failed to do so, their estate has terminated, unless it be supported in some other manner than by the act of Maryland."

Said treaty provides for two different classes of laws: (1) Where the laws of the state permit aliens to hold or inherit, and (2) where they are not permitted to hold. In the latter case the treaty expressly provides that the state or canton may fix the term in which to sell said property. Were the construction insisted on by appellants to be placed upon the treaty there would be no need of the last clause, because in every case in which they could inherit they would fall within said first clause. By the laws of our State aliens are not permitted to hold real estate, and, consistent with the last clause of said treaty, the time in which they may transfer it has been limited. The court did not err in its conclusions of law.

Judgment affirmed.

Hadley, J., did not participate.

CLORE ET AL. v. SMITH ET AL.

[No. 6,615. Filed February 15, 1910.]

1. **WILLS.—Remainders.—Contingent.—Vested.—Postponement.—Presumptions.**—The law favors the vesting of estates absolutely, rather than contingently, and at the earliest possible moment, the presumption being that words of postponement relate to the beginning of the time of enjoyment and not to the vesting of the estate. p. 342.
2. **WILLS.—Construction of Language.—Presumptions.**—The presumption is that the words of a will were employed in their customary legal sense. p. 342.
3. **WILLS.—Remainders.—Vesting.**—A will devising to testator's widow certain real estate for life, and further providing that "at her death * * * the rest and residue of [his] property to be divided among [his] children then living and their descendants," gives a remainder to testator's children, vesting at his death, but the enjoyment of which was postponed until the death of such widow, *Corey v. Springer*, 138 Ind. 506, and *Wood v. Robertson*, 113 Ind. 323, distinguished. p. 343.
4. **WILLS.—Legacies.—Vesting.—Enjoyment.**—A will bequeathing to each of two of testator's sons a certain sum of money, making such sums a charge upon certain devised lands, and providing that "at her [testator's widow's] death, after the payment of said sums" the remainder of the property to be divided, gives a legacy to such two sons, vesting at testator's death and payable upon the death of his widow. p. 346.

From Howard Circuit Court; *J. F. Elliott*, Judge.

Suit by Mary E. Clore and others against William A. Smith and others. From a judgment for defendants, plaintiffs appeal. *Affirmed*.

Kirkpatrick & Morrison, for appellants.

Bell & Purdum and *Harness, Moon & Voorhis*, for appellees Kellar and Moore.

Overton & Barnes, for appellees William A. Smith and H. L. Smith.

HADLEY, J.—On November 23, 1887, William A. Kellar departed this life testate, and owning certain lands in Howard county. He left surviving him a widow, three

daughters, four sons and two grandsons. On May 17, 1907, the widow, Susan M. Kellar, died, leaving surviving her, as heirs, two daughters and three sons. One of the sons, Charles R. Kellar, died after the death of the testator and before the death of the widow, without leaving surviving him any child or descendant of any child, but leaving a widow, appellee Mahala Jane Kellar, to whom said Charles Kellar, by his will, bequeathed all of his property, real and personal, and one of the daughters, Sarah K. Moore, died after the death of the testator, and prior to the death of the widow of testator, leaving no child or descendant of any child, but leaving a husband, appellee Alonzo W. Moore, and her mother, Susan Kellar, as her only heirs. The will of William A. Kellar provided for the payment of his debts and funeral expenses, and devised to his widow, Susan M. Kellar, all of his personal property of every character absolutely, and a life estate in all of his real estate remaining after the payment of debts. Item three of said will, which is the item involved in the controversy, is as follows:

"I will and devise that at the death of my beloved wife, Susan M. Kellar, that all my said property herein devised then remaining shall be disposed of as follows, to wit: That William A. Smith and Henry L. Smith, my grandsons, be each given and paid the sum of \$400, and the same is hereby made a charge upon my said real estate, not mentioned in item first of this will, but in no event to be paid until after my beloved wife's death. And at her death, after the payment of said sums of \$400, as herein provided, for the rest and residue of my property to be divided among my children then living and their descendants, such grandchildren, or great grandchildren, as the case may be, to take a parent's part only; Provided, that said William A. Smith and Henry L. Smith are only to have said sum of \$400 each in any event."

The question presented here is whether the remainder over in said real estate vested in the children of testator at the time of the testator's death, or whether it was a contingent remainder until the death of the widow, Susan M.

Kellar, it being conceded that the widow had a life estate in said land. Appellants insist that by the terms of item three the vesting of the estate is postponed until the death of the widow, and cite, as sustaining this construction, the language of said item, which provides that the property is to be divided among the children then living and their descendants, and also the provision that this division shall not be made until after the specific bequest of \$400 each to the grandsons shall have been paid. And, to sustain this contention, appellants cite the case of *Corey v. Springer* (1894), 138 Ind. 506. Appellees, however, contend that by the language of this item the title vested at the death of the testator, and the postponement fixed in item three was merely the postponement of the enjoyment.

It is an established principle that the law favors the vesting of remainders absolutely, rather than contingently, and at the earliest possible period, and presumes that

1. words of postponement relate to the beginning of enjoyment and not to the vesting of the estate.

Myers v. Carney (1908), 171 Ind. 379; *Taylor v. Stephens* (1905), 165 Ind. 200.

And it will be presumed, in the absence of language in the will repelling the inference, that the words and expressions used were employed in the light of the settled mean-

2. ing which the law attached to such words and expressions.

Taylor v. Stephens, supra; *Fowler v. Duhme* (1896), 143 Ind. 248. As was said in the case of *Taylor v. Stephens, supra*: "Of course, there is no iron rule of law binding words of survivorship to the time that the will takes effect, and therefore the courts will look to the language of the instrument in endeavoring to ascertain the intention of the testator; but the effect of the rule, prescribing, as it does, the meaning of the will in the absence of a clear expression to the contrary, is to interdict the effort to draw up the intention of the testator from the depths of his words after it is perceived that the intent is not clear." In

the case of *Heilman v. Heilman* (1891), 129 Ind. 59, the court presents the following rule for determining whether a remainder is vested or contingent: “ ‘We think that the question of vesting, or remaining contingent, depends upon whether the condition of the intervening estate determining, and the estate over taking effect, is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested. But in every case where the existence of the secondary estate is made dependent upon a contingency which may never happen, or never happen so as to allow of the vesting of the secondary estate, then the devise or bequest must be regarded as contingent, as well in its character as in regard to the time when it will come into operation.’ [2 Redfield, Wills, 218, 6.] * * * In *Bruce v. Bissell* [1889], 119 Ind. 525, this language is used: * * * ‘An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event, upon which the vacancy depends, must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determines whether or not the estate is vested or contingent.’ ”

Applying these rules to the will before us, it seems clear that we must hold that by its terms the widow took a life estate in the land, that the remainder over vested

3. at the time of the testator's death in his children, subject to the legacies to his grandsons named, and that the time fixed therein for the division had reference to the enjoyment of the respective interests. We are supported in this view by the case of *Davidson v. Koehler* (1881), 76 Ind. 398, where the testator, after bequeathing a life estate to the widow, proceeded in part as follows: “At the death of my wife * * * I

direct that my home farm shall then be divided among my children then living, share and share alike, * * * and in case any of my children shall have died after my decease, and before such division, the heirs or representatives of such deceased child shall be entitled to such share as their respective ancestors would have received if then living." The court, in an exhaustive and well-reasoned opinion, held that the remainder vested at the death of the testator. This opinion was afterwards reaffirmed in *Davidson v. Bates* (1887), 111 Ind. 391, and has been cited with approval many times since. And our decision is further supported in principle by the following cases: *Myers v. Carney, supra*; *Tindall v. Miller* (1896), 143 Ind. 337; *Amos v. Amos* (1889), 117 Ind. 19; *Taylor v. Stephens, supra*; *Harris v. Carpenter* (1887), 109 Ind. 540; *Burke v. Barrett* (1903), 31 Ind. App. 635; *Campbell v. Bradford* (1906), 166 Ind. 451; *Heilman v. Heilman, supra*; *Hoover v. Hoover* (1889), 116 Ind. 498.

The only cases that have been cited by appellants as directly having a contrary effect are (*Orey v. Springer, supra*, and *Wood v. Robertson* (1888), 113 Ind. 323. As we view the case last cited, it can hardly be considered as an authority or precedent here. The will under consideration in that case gave a life estate to the widow, and at her death the property was to be divided equally, share and share alike, among testator's children then living, and the descendants of such as might be dead. The question for decision was whether the descendants of a child that had died took *per stirpes* or *per capita*. But in the course of the opinion the court discussed the question as to whether the remainder over was vested or contingent until the death of the widow, and on this point the court uses this language: "The testator intended by this will to devise to his wife an estate for life, and to give his children living at her death, and the descendants of such as were then dead, a vested remainder. * * * Our reason for asserting that the estate

in expectancy is a vested and not a contingent remainder is that there was no uncertainty as to the taking effect of the estate, although there was as to the time it would take effect. As Judge Sharswood says: 'It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of its enjoyment.' There is here no uncertainty as to the event on which the particular estate must determine, for, as Preston says, it is morally certain the life tenant must die, so that if there is any uncertainty it must be as to the persons to whom the remainder is devised. 4 Kent's Comm. (12th ed.), *203, note. But we think that, construing all the provisions of the will together, it must be held that the remainder was intended to be in the nature of a vested one. * * * We are by no means clear that the heirs take by purchase and not by descent, for, eliminating the provisions as to the life estate of the widow, the evident intention was to create just such an estate as the law would cast by descent upon the children and grandchildren." The court then proceeds to determine the question at issue, and holds that "the descendants" take *per stirpes* and not *per capita*. As we understand the language quoted, it is in accord with our opinion. In the case of *Corey v. Springer*, *supra*, the will provided that the widow should keep and use the real and personal property during her natural life, if she so long remained a widow, but in case of her remarriage this provision was to be void, and she should take of testator's property as provided by law of descent. In the case of the death of the widow, without having remarried, the will proceeds: "I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be. In case my wife should again marry, and so take the provision herein made for her, in that event, under the law of Indiana, I bequeath the remainder of my estate, real and personal, to my chil-

dren, and the representatives of such as may be dead, if any, as provided in the former part of this will.”

It will be observed that the remainder over was determinable by one of two contingencies, either of which might not happen, viz., her remarriage or death without remarriage. In one case the interests of the remaindermen might be essentially different from what it would be in the other, and in the nature of things these interests could not be definitely determined until the death of the widow. The testator specifically fixed the time when these interests should be measured, and designated the parties who should partake as of the time when such distribution should be made. The will in that case provided:

“If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be.”

And as was held in the case of *Campbell v. Bradford*, *supra*: “This language clearly shows that the words of survivorship used in the Springer will referred to the death of any of his children at any time before the death of his widow if she survived him, as was held in that case.” No such definite language is found in the will in this case.

Our position is not inconsistent with the provisions of the will in regard to the legacies bequeathed to the two grandsons. It is clear that these legacies are made to vest

4. upon the death of the testator, as they are made a lien upon the land; but their payment or enjoyment is postponed until the death of the widow, and this might be taken as some evidence that the testator intended that all the objects of his bounty should be treated alike, and that all interests should vest and be enjoyed at the same time. The construction we have here given to the will is the construction given by the court below, and it is conceded that under such construction the finding should be for appellees.

Judgment is therefore affirmed.

Dunlap v. Indiana Union Traction Co.—45 Ind. App. 347.

DUNLAP v. INDIANA UNION TRACTION COMPANY.

[No. 6,879. Filed February 15, 1910.]

1. TRIAL.—*Instructions.—Duplication of.*—It is not erroneous to refuse an instruction already covered by one given. p. 349.
2. TRIAL.—*Instructions.—Prolivity.—Vagueness.*—Instructions should be terse and clear. p. 349.
3. MASTER AND SERVANT.—*Changing Work.—Injuries.—Complaint.—Paragraphs.—Instructions.—Interrogatories.*—The refusal of the judge to instruct on a paragraph of complaint alleging that defendant negligently ordered the plaintiff to perform certain work outside of the scope of his employment, by reason whereof he was injured, is not prejudicial, where the answers to the interrogatories, as well as the evidence, show that the plaintiff, at his own request, changed his work. p. 349.
4. TRIAL.—*Instructions.—Applicability to Evidence.*—Instructions should be applicable to the evidence. p. 350.
5. MASTER AND SERVANT.—*Assumption of Risk.—Danger.—Knowledge or Comprehension of.—Instructions.*—An instruction that a servant assumed the risk of danger when he "knew" thereof and continued in the employment, is not prejudicial for its failure to state that such servant should also "comprehend" the danger. p. 350.
6. MASTER AND SERVANT.—*Complaint.—Instructions as to Negligence Not Alleged.*—Where no negligence was alleged as to the fastening of wire upon a spool, in the unwinding of which the plaintiff was injured, an instruction which eliminates such negligence as a factor in the case, is not injurious. p. 350.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Action by James Dunlap against the Indiana Union Traction Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

George Young, John M. Bailey and George W. Grubbs, for appellant.

J. A. Van Osdol, Kittinger & Diven and Oscar Matthews, for appellee.

RABB, J.—The appellee owns and operates an interurban railway between Indianapolis and Anderson, and other cities, and at the time of the happening of the accident, out of

which this action grew, was building a track about one mile in length, connecting its main line with the United States army post, near Indianapolis. The track had been laid, the trolley posts set, and defendant was engaged in putting up the trolley wires. In doing this work, a small car, known as a gondola-car, was used on the track. A spool of trolley wire, fixed in such manner that it would revolve upon a spindle, was placed in what is called a jack. This was in the form of an ordinary sawbuck, but made out of very heavy material, and was placed on this car, and a horse attached to the car, by means of which it was drawn along the track, and the wire paid out from the spool as it was needed in stringing it upon the posts. A flat-car, upon which a tower reached up to the arms to which the wire was to be attached, followed the gondola-car. This car was pushed by one of appellee's employes, another employe, whose duty it was to attach the wire to the arms on the posts, was on the tower, and another employe, who had charge of the brake on the gondola-car and controlled the movements of the car, was the foreman in charge of the work. The appellant was injured by reason of the upsetting of the jack and spool of wire on him, while he was sitting in front of them, engaged in "braking" the spool of wire by the use of a board provided for that purpose, which prevented the spool from revolving too rapidly and paying out too much wire.

Appellant's complaint, which is in three paragraphs, charges appellee with negligence, proximately causing the injury complained of. The case was put at issue, a jury trial had, resulting in a general verdict in favor of appellee. With the verdict the jury returned answers to certain interrogatories submitted to them. Appellant's motion for a new trial was overruled, and judgment was rendered upon the verdict.

The errors relied upon for reversal are the action of the court in refusing a certain instruction requested by the

appellant, and the giving of certain instructions by

1. the court. The instruction tendered by the appellant was fully covered by other instructions given by the court; hence no error intervened in refusing the instruction tendered.

Some of the instructions given by the court to the jury are justly subject to criticism, for their extreme prolixity and lack of clearness; but, upon the showing made

2. by the record, no reversible error appears in the giving of the instructions complained of. One of the principal grounds of criticism is the failure of the court, in giving the instructions, to take proper cognizance of the distinction between the several paragraphs of appellant's complaint, and especially between the reciprocal duties of appellant and appellee, upon the facts set forth in the first paragraph of complaint, and these same duties under the second and third paragraphs. All of these paragraphs of complaint charge precisely the same acts of negligence against the appellee, to wit, failure to fasten the jack, in which the spool of wire was fixed, to the floor of the car, negligently placing the spool of wire on the front end instead of the rear end of the car, and negligently attempting to pull the car around a curve in the road, by reason of which effort the wire was made to cross and bind on the spool, causing the spool and jack to upset. It is also alleged that appellee knew of the danger growing out of the facts averred and that appellant did not.

The first paragraph, in addition to these facts, averred that appellant was employed to drive the horse drawing the car, and for no other purpose, and that he was taken

3. from this service by appellee, and set to "braking the spool." The failure of the instruction complained of to note the distinction with reference to the assumption of risk on the part of appellant under this state of facts, considered with the rule on the same subject under

a state of facts shown by the other two paragraphs, is insisted upon as a reversible error. This question is, however, eliminated (1) by the answers returned by the jury to the interrogatories submitted to them, and (2) by the uncontroverted evidence. It appears from the evidence and the answers to interrogatories that appellant was employed originally to drive the team drawing the car carrying the spool of trolley wire, but that after the work had proceeded a short time, the appellant, at his own suggestion, was permitted to exchange work with the man engaged in "braking the spool" of wire.

Instructions to a jury are designed to enable the jury to apply the law to the facts as they shall be established by the evidence, and if a party has in some paragraph

4. of his pleadings set up a case to which the evidence introduced upon the trial has no application, no error intervenes, if the court ignores such pleading in its instructions to the jury.

It is further insisted that the instructions on the subject of the assumption of risk, as applied to the second and third paragraphs of complaint, are incorrect, for the reason

5. that they impose the assumption of risk upon the appellant, if he simply "knew of the danger," and that simple knowledge is not enough. He must "comprehend the danger." This instruction is not justly subject to the criticism urged against it.

The court instructed the jury that if it found that Patterson was the appellee's foreman in charge of the work; that all spools of wire theretofore used by Patterson were

6. free of fastening by staples attaching the wire to the spool, except those appearing on the outside of the surface of the spool, where the end of the wire was attached to the spool, for the purpose of keeping it from unwinding; that down in the wire on this spool, concealed from view, so that it could not be detected, the wire was fastened to the spool by means of a staple; that neither appellee nor

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its foreman knew, or could have anticipated, such fact; that the proximate cause of the accident and appellant's injury was the fact that said wire was so fastened to the spool—then appellant could not recover. This instruction, it is claimed, does not eliminate the idea that the defendant company may not have put the staple in the spool and caused the accident. It is not alleged in the complaint that appellee was guilty of any negligence in connection with the preparation of the reel of wire on the spool. If such fact had been averred in the complaint as a negligent act of the appellee, proximately causing the injury, and the appellee thereby challenged to meet it, a question might have been presented to this court, but no such question is presented by the record. Had the appellee been challenged thus to meet this question, it could doubtless very readily have established the fact that it bought the wire already upon spools put up by the factory where manufactured, and that it was not expected that the wire would be fastened to the spool inside of the surface.

If this fact was the cause of the accident and appellant's injury, and not the alleged negligence of the appellee, as averred in the complaint, the appellant has no case. There was no error in giving this instruction, and the jury specially find in the answers to interrogatories that the wire's being thus fastened by the staple down below the surface of the spool, where it was not discernible to either appellant or appellee, was the proximate cause of the injury, and this finding is well sustained by the evidence. In this state of the case no mistake the court may have made in its instructions would constitute reversible error.

Judgment affirmed.

COOK v. ORMSBY ET AL.

[No. 6,505. Filed October 27, 1909. Rehearing denied January 28, 1910. Transfer denied February 16, 1910.]

1. MASTER AND SERVANT.—*Factory Act.—Dangerous Machinery.—Failure to Guard.—Negligence.*—The master's failure to guard dangerous machinery, where it is possible to do so, constitutes negligence *per se*. p. 354.
2. MASTER AND SERVANT.—*Factory Act.—Common Law.—Section 8020 Burns 1908, Acts 1899, p. 231, §9, compelling employers to guard dangerous machinery extends the common law duty of masters as to furnishing safe places, works and machinery.* p. 354.
3. MASTER AND SERVANT.—*Factory Act.—Unguarded Saw.—Acts of Fellow Servant.—Complaint.*—A complaint alleging that defendants instructed the plaintiff to work at an unguarded saw, that such saw could have been guarded without impairing its usefulness, that a fellow servant pushed or pinched him, causing him involuntarily to thrust his hand into such saw, to his injury, states a cause of action. p. 355.
4. MASTER AND SERVANT.—*Factory Act.—Negligence.—Concurrent Proximate Causes.*—Where a master's negligence concurs with a fellow servant's in producing an injury to another servant, such master is liable. p. 355.
5. NEGLIGENCE.—*Proximate Cause.—Anticipation of Injury.*—To constitute actionable negligence it is not necessary that defendant should have anticipated the precise injury occasioned by the negligent act. p. 356.

From Tippecanoe Circuit Court; *Richard P. De Hart*, Judge.

Action by Louis Cook against John Ormsby and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

Boulden & Boulden, Hanna & Hall and *Wilson & Quinn*, for appellant.

Stuart, Hammond & Simms and *Miller, Shirley & Miller*, for appellees.

MYERS, J.—Appellant in his complaint alleged that on March 28, 1904, appellees were engaged in business as part-

ners under the firm name of the "Western Hoop Company," and were then engaged in operating a mill and machinery in the manufacture of hoops and lumber at the town of Ockley; that on said day appellant was in the employ of appellees, and under the orders and directions of the latter was engaged in operating an edging saw and machinery by running plank and other lumber against said saw, which was about eighteen inches in diameter, set in a frame constructed of wood, with a movable track attached, and used for the purpose of stripping off the bark and straightening the edges of the lumber there used in said manufacturing plant; that prior to the day of the accident, and on the forenoon of that day, appellant was engaged at other labor in and about said factory, and had no knowledge or experience in the operation of said saw, nor of the attending danger in its operation without a proper guard, all of which the appellees at the time well knew; "that said saw could have been guarded and made absolutely safe without impairing its usefulness for the purpose for which it was intended;" that appellees carelessly and negligently ran said saw with which appellant so worked without providing any proper guard around and over it, and failed to provide any means whatever to protect appellant from coming in direct contact with such saw while so operating it; that appellees knew that said saw at that time had no guard or other device for the protection of the operator; that on said March 29, having full knowledge of the facts aforesaid, appellees ordered and required appellant to quit his other labors in said factory and to operate said saw as aforesaid, which orders he then and there obeyed, and while thus engaged in the discharge of his duties, and without fault or negligence on his part, and while in the act of pushing a board through said saw to take off the rough edges thereof, and while his attention was wholly and completely directed to said work, one of appellees' employes sud-

denly and without warning to the appellant pinched or pushed him from behind, causing him involuntarily to start and thrust his hand forward into said saw, and in consequence of appellee's negligence, as aforesaid, and by reason of the unprotected and unsafe condition of appellee's said saw, as aforesaid, appellant's right hand, wrist and arm came in contact with said saw and were injured; that said injuries were occasioned by the carelessness and negligence of the appellees, as aforesaid, and without any fault or negligence on the part of appellant.

To this complaint, which was in one paragraph, a demurrer for want of facts was sustained. Appellant refused to plead further, and judgment was rendered against him and in favor of appellees for costs.

Does the complaint, the substance of which we have given, state a cause of action? The statute (§8029 Burns 1908.

Acts 1899, p. 231, §9) makes it the duty of the

1. owner of any manufacturing establishment properly to guard all saws therein while they are in use, and the failure of such owner to obey this statutory mandate, when possible so to do, ordinarily will be regarded as negligence *per se*. *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413; *Evansville Hoop, etc., Co. v. Bailey* (1909), 43 Ind. App. 153; *United States Cement Co. v. Cooper* (1909), 172 Ind. 599; *Nickey v. Dougan* (1905), 34 Ind. App. 601. It has been held that this statute extends the common-law duty of persons operating manufactur-
2. ing plants as to furnishing safe place, works and machinery for their employes (*Bessler v. Laughlin* [1907], 168 Ind. 38; *Robbins v. Fort Wayne Iron, etc., Co.* [1908], 41 Ind. App. 557), its purpose being to minimize the danger in the use of dangerous machinery in such plants. In the case before us, the saw was unguarded. It could have been guarded without rendering it useless for the purposes intended. While appellant was engaged in the work assigned to him his hand came in contact with said saw and

was severely injured. It is argued that the unguarded saw was not, and that the act of a fellow servant in pinch-

3. ing appellant was, the proximate cause of the injury.

The complaint shows that appellees disregarded a statutory duty owing by them to the appellant, which omission, under the decided cases in this State, constituted negligence. The alleged act of appellant's fellow servant, as a matter of law, might or might not be considered negligence, for from that act the injury complained of did not necessarily follow. The question might be made to depend upon the facts and circumstances existing at the time the act was committed. But if it be conceded that the act was a negligent one, in that it caused appellant involuntarily to thrust his hand against an unguarded saw, we fail to see how it would furnish an excuse for appellees' neglect to discharge their statutory duty toward appellant. It is said that the injury was the natural sequence of the pinching—the act of a responsible agent—and without which the accident would not have happened. On the other hand, it is certainly true that had the saw been properly guarded the injury would have been avoided, for, without the negligence of appellees the accident would not have occurred. Therefore, whether the negligence of appellees directly produced or concurred directly in producing the injury can

4. make no difference, as in either case the negligence of appellees will be regarded as a proximate cause of the injury. *Bessler v. Laughlin*, *supra*; *Tucker & Dorsey Mfg. Co. v. Staley* (1907), 40 Ind. App. 63; *Rogers v. Leyden* (1891), 127 Ind. 50; *Louisville, etc., R. Co. v. Heck* (1898), 151 Ind. 292; *Espenlaub v. Ellis* (1904), 34 Ind. App. 163; *Hancock v. Keene* (1892), 5 Ind. App. 408; *Coppins v. New York, etc., R. Co.* (1890), 122 N. Y. 557, 25 N. E. 915, 19 Am. St. 523; *Seigel, Cooper & Co. v. Trcka* (1905), 218 Ill. 559, 75 N. E. 1053, 2 L. R. A. (N. S.) 647, 109 Am. St. 302; *Baltimore, etc., R. Co. v. State, ex rel.* (1871), 33 Md. 542; *Board, etc., v. Mutchler*

(1894), 137 Ind. 140. Appellees, under the pleaded facts, were clearly negligent, and must be held responsible for injuries proximately resulting from such negligence, the injured party himself being without fault.

"It is not essential that the identical or precise injury sustained by appellant should have been expected or anticipated by appellee as the result of its negligent
5. act. It, by the exercise of reasonable care, might have foreseen or anticipated that from the negligent breach of its statutory duty it was probable that injury of some kind might result to its employes engaged in operating the saw." *Davis v. Mercer Lumber Co.*, *supra*. The opinions in the cases of *Coy v. Indianapolis Gas Co.* (1897), 146 Ind. 655, 36 L. R. A. 535, and *Bessler v. Laughlin*, *supra*, approve the statement taken from 1 Sutherland, Damages (2d ed.), §16, that "the law is practical, and courts do not indulge refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties." In the case of *Bessler v. Laughlin*, *supra*, it was said: "Whether a defendant was called on to apprehend that any injury might result from his omission is a matter which ordinarily goes to the question of whether there was any negligence. But granting that the omission was negligent, that, without the intervention of any supervening cause, the wrong followed the injury in a natural sequence, and that the negligence and the injury were so correlated that morally the defendant's omission should be regarded as the efficient cause of the wrong complained of, it may, without hesitation, be affirmed that such omission should be regarded as a proximate cause of the injury."

Appellees seem to rely on the case of *Claypool v. Wigmore* (1904), 34 Ind. App. 35, as sustaining their contention in

this case. It will be observed by a careful reading of that case that this court there recognized the doctrine announced in the line of decisions which we regard as controlling the rights of the parties to this appeal. In that case the decision rests upon the facts exhibited by the answers to the interrogatories, from which it clearly appears that the only act of negligence, if it may be so claimed, chargeable to Claypool was that of leaving ajar the door to an elevator shaft. The injured party could not have entered the shaft through the door without sliding it back, which was done by a person not connected with Claypool, or having anything to do with the running of the elevator. The injury in that case could not have happened in the absence of the act of such third party. In short, the facts in that case do not show negligence of Claypool of itself producing a dangerous condition of things, upon which the negligent act of a third person operated and which might reasonably have been anticipated to work the injury described. In the case before us the negligence of appellees did produce a dangerous condition in the vicinity of which appellant was employed to work and, as said, it was not unreasonable to expect injury to occur to such employe by reason of the danger to which he was thus exposed. Whether, from having his hand drawn into the saw by a board, or from becoming unbalanced, or being accidentally struck by another employe while in the line of his work, or from surprise caused by a pinch, he accidentally or involuntarily struck the saw and was injured—the principle applies "that the first act is regarded as being continuous in its operation up to the time of the second, and therefore, for the purposes of fixing defendant's liability, the two acts are treated as contemporaneous." *Indianapolis Union R. Co. v. Waddington* (1907). 169 Ind. 448.

Judgment reversed, with instructions to overrule appellees' demurrer to the complaint.

PLASKETT v. BENTON-WARREN AGRICULTURAL
SOCIETY.

[No. 6,534. Filed November 23, 1909. Petition to modify mandate denied February 16, 1910.]

1. TRIAL.—*Taking Case from Jury.—Demurrer to Evidence.—Assessment of Damages.*—It is discretionary with the trial judge, upon the filing of a demurrer to the evidence, to have the jury assess the damages conditionally, or to discharge the jury and, if the demurrer be overruled, to empanel a new jury to make such assessment, the latter course being preferable. p. 360.
2. APPEAL.—*Demurrer to Evidence.—Rulings on Sufficiency of Answer.—Harmless Error.—Briefs.—Waiver.*—Where defendant demurred to the evidence, alleged errors in overruling plaintiff's demurrer to paragraphs of answer will be considered harmless; and such alleged errors are waived by a failure to discuss them. p. 360.
3. TRIAL.—*Taking Case from Jury.—Demurrer to Evidence.—How Considered.*—On defendant's demurrer to the evidence the court must accept as true all facts favorable to the plaintiff which the evidence shows either directly or by inference, and where the evidence is in conflict that which is unfavorable to the plaintiff must be rejected. p. 360.
4. NEGLIGENCE.—*County Fairs.—Shooting Galleries.—Free Admission of Boy Contrary to Rule Requiring Pay.*—Evidence showing that a boy twelve years old was admitted into a county fair free by the society's gateman, that the rule required boys over ten years old to pay a fee for admission, there being no evidence that the boy knew of such rule, that while standing near a shooting gallery authorized by defendant society he was killed by a gun negligently handled by a boy who was engaged in shooting, with defendant's authority, supports an action for damages by the father of such boy. p. 361.
5. TRIAL.—*Taking Case from Jury.—Demurrer to Evidence.—New Trial.*—On the overruling of defendant's demurrer to the evidence a new trial cannot be asked or granted, the facts, except on the assessment of damages, being admitted by such demurrer. p. 365.
6. APPEAL.—*Demurrer to Evidence.—Ordering New Trial.—Discretion.*—Where defendant's demurrer to the evidence was sustained and the plaintiff appeals, the Appellate Court's order should be for the overruling of such demurrer, if the facts warrant, and not for a new trial. p. 365.

From Superior Court of Tippecanoe County; Henry H. Vinton, Judge.

Plaskett v. Benton-Warren, etc.. Soc.—45 Ind. App. 358.

Action by Charles S. Plaskett against the Benton-Warren Agricultural Society. From a judgment for defendant, plaintiff appeals. *Reversed.*

L. J. Copping, W. A. Swank and C. E. Thompson, for appellant.

Daniel Fraser, Will H. Isham, Will R. Wood and Burke Walker, for appellee.

MYERS, C. J.—Appellant brought this action against appellee to recover damages resulting from the loss of services of his son, who was killed by a shot fired from a rifle used at a shooting gallery located upon appellee's fair grounds. The complaint was in four paragraphs, differing only as to the allegation naming the party who held the gun at the time the fatal shot was fired.

The general purport of these several paragraphs will appear from the following statement of facts: In September, 1905, appellee, a corporation, was holding one of its annual fairs on grounds controlled by it, and to which all persons, regardless of age, sex or condition, had been and were by it invited. Appellee, among other attractions, exhibitions and various amusements, had provided and authorized a shooting gallery or target range to be carried on in that part of the ground where the public was accustomed to and did on that day congregate in large numbers, without making adequate provisions for the protection of visitors from bullets, accidentally, prematurely or carelessly discharged from the guns in use at such range, and which were of a dangerous and deadly character. On September 7, 1905, and while there were from five to six thousand people on the grounds, many of whom, including appellant's son, a lad twelve years of age, were congregated about said gallery, the operator thereof, as also the appellee, permitted a boy fifteen years of age to use and shoot one of its guns, using cartridges .22 caliber in size, and having a high degree of explosive force, and momentum sufficient to penetrate the human body.

While said boy was using said gun it was prematurely and accidentally discharged, the ball thereof striking appellant's son in the forehead, producing a wound from which he died. To this complaint answers were filed and issues formed, which were submitted to a jury for trial. At the conclusion of appellant's evidence, appellee demurred thereto, on the ground that it was insufficient in law to support the issues made by the pleadings. The court sustained this demurrer and overruled appellant's motion to have the damages assessed conditionally, and judgment was rendered against appellant and in favor of appellee for costs.

The assignment of errors relates to the action of the court (1) in sustaining the demurrer of appellee to the evidence. (2) in overruling appellant's motion to have the damages assessed conditionally, and (3) in overruling appellant's demurrer to the second and third paragraphs of answer.

The second assignment relates to a matter which is entirely discretionary with the court; that is to say, the court might have the damages assessed by the jury condi-

1. tionally, or the jury may be discharged, leaving the damages to be assessed by another jury should the demurrer be overruled. The latter is the better practice. *North British, etc., Ins. Co. v. Crutchfield* (1886), 108 Ind. 518, 530; *Lindley v. Kelley* (1873), 42 Ind. 294.

The third assignment is waived, and if it were not,

2. no harm to appellant is shown to have come from the court's ruling in this particular.

The first assignment presents the only debatable question submitted for our consideration. In the case of *Scheerer v.*

Chicago, etc., R. Co. (1895), 12 Ind. App. 157, it was

3. held that where a demurrer to the evidence is sustained, "the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the party demurring, to draw from the evidence all such reasonable inferences as a jury might draw. * * * If there is a conflict in the evidence then the court can consider only

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such evidence as is favorable to the party against whom the demurrer is directed, and that which is favorable to the demurring party is deemed withdrawn." In the case of *Thomas v. Hoosier Stone Co.* (1895), 140 Ind. 518, it was held that "a demurrer to evidence admits all facts of which there is any evidence, and all conclusions which can be fairly and logically drawn from such facts." See, also, *Palmer v. Chicago, etc., R. Co.* (1887), 112 Ind. 250; *Milburn v. Phillips* (1894), 136 Ind. 680. The rule controlling the question before us seems to be that if the evidence and the inferences which may be drawn therefrom, although weak and inconclusive, fairly tend to support every material fact of the complaint, the demurrer should be overruled. In the case of *Lindley v. Kelley, supra*, it is said: "No advantage can be taken of any defect in the pleading, as a reason for sustaining" such demurrer.

In support of the judgment below the appellee insists that the undisputed proof clearly establishes that appellant's son, at the time he was killed, was on the premises of

4. the appellee as a trespasser or, at most, a licensee, and therefore appellee was under no obligation to guard him against open and obvious dangers. From the evidence it appears that on September 7, 1905, appellee had control of certain grounds near the town of Boswell, Indiana, and was holding thereon what was known as its annual fair. On the afternoon of that day the fair was attended by from five to six thousand people. On its said grounds was a race track, an amphitheater, dining hall, a floral hall, a machinery display, a merry-go-round, peanut and popcorn stands, a shooting gallery, engines and various kinds of machinery in motion, race horses and other live stock on exhibition, and places of amusement, such as shows, etc. An admission fee of twenty-five cents was charged to all persons over ten years of age. all under ten years were admitted free. The ticket sellers would exercise their judgment as to the age of children and sometimes would pass

children free who were more than ten years of age. The gatekeepers would look at a boy when he came up to the gate, and if he looked to be under ten years of age he would be admitted free. Appellant on said day was forty years of age and his son was twelve years of age. On the afternoon of said day, appellant's son, with a younger brother, went to one of the gates opening into said fair ground and was told by one of appellee's gatekeepers to go on in, and they did so. No fee was demanded of them and they paid none. After entering appellee's grounds, they went to a pop-corn and peanut stand, then to a water well maintained by appellee, thence north a short distance along a walk, within ten feet of which and on the east side thereof was located a shooting gallery operated by a licensee of appellee. This gallery was lengthwise north and south and faced the north. It was five feet wide. When appellant's son that was killed reached a point on the west side of said shooting gallery, and about six or seven feet southwest from the front thereof, he stopped, and, with a number of boys there congregated, was watching the persons there engaged in shooting at targets with guns loaded with gunpowder and leaden balls. Among those thus engaged was a boy fifteen years of age, who, while handling one of the guns there used as aforesaid, accidentally caused such gun to be discharged, the bullet therefrom striking appellant's said son in the forehead, mortally wounding him. Said gallery was located on that part of said grounds where large crowds were accustomed to congregate, and at the time of the accident it was estimated that from one hundred fifty to two hundred people were assembled along the walk and near the place occupied by the boy at the time he was killed. From the front of the gallery back for a distance of about thirty-one feet to what was known as a "splash board" a rope was stretched, otherwise this space was open. The boy who was killed attended the fair in the forenoon of the day of the

accident, and was admitted by appellee without charge. On neither of these visits was he accompanied by an older person.

From these facts the jury might readily infer that the boy was attracted and sought admission to the grounds of appellee because of the numerous attractions, exhibitions and contests it had there provided and was maintaining. It had provided amusements for the young as well as the old, and for all classes of people who might there assemble. The evident purpose of these various forms of entertainments, exhibitions and contests was to attract the people to the grounds and induce them to pay the admission fee, and by means thus derived and from privileges sold the corporation was enabled to continue its business. The value of these privileges would necessarily depend upon the number of people in attendance. Unless the appellee could induce the people generally to take an interest in its enterprise and enter its grounds, the value of the privileges would be lowered and its revenue reduced. So it was interested in keeping up an attendance, and to that end it waived the admission charge to children under ten years of age, and was not especially active in collecting admission fees from older children. While it was a rule of appellee to require an admission fee from all persons over the age of ten years, yet there is no evidence from which it may be inferred that the boy in question knew of such a rule. The presence of the boy on the grounds of appellee was not inconsistent with the business in which it was engaged; nor can it be said that he was not there as a participant in the business being transacted; nor that appellee could not have anticipated his presence as one of its patrons; nor that there was no common interest or mutual advantage.

From the facts and circumstances disclosed by the record and the principles of law governing the consideration of this case we are impressed with the belief that the jury might

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have found that the boy was upon appellee's premises, when injured, not as a trespasser or as a mere licensee, but was there by its invitation, and, if so, it owed him the duty of exercising ordinary care to protect him from dangerous agencies known by it to exist and permitted on its grounds set apart for the use of the public. In the case of *Howe v. Ohmart* (1893), 7 Ind. App. 32, 38, this court held that "it is not necessary that the invitation should be special, or even direct. It may be implied from the circumstances and facts of the case. He who uses a building for certain business purposes must keep it in reasonably safe condition for all who visit the building for the purpose of transacting the ordinary business there, otherwise he is liable to one injured." In 2 *Shearman & Redfield, Negligence* (5th ed.), §686, it is said: "A very high degree of care is required from all persons using firearms in the immediate vicinity of other people, no matter how lawful, or even necessary, such use may be." In the case now being considered the evidence shows the use of firearms in the immediate presence of from one hundred and fifty to two hundred people congregated on the side of the gallery where the boy stood at the time he was shot. These people were without protection from the guns there in use, if discharged while pointing outside of the range, described to be five feet wide. Under such conditions, it would not be unreasonable to conclude that the place was unsafe and dangerous, and that it was the duty owing from appellee to the people thereabout, including the boy in question, to provide them better protection, and that there was a failure to perform that duty, by reason of which the boy was killed.

Judgment reversed and the cause remanded, with instructions to the trial court to overrule the demurrer to the evidence.

ON PETITION TO MODIFY MANDATE.

PER CURIAM.—Appellee has filed a motion for a modification of the mandate entered by this court upon the original opinion, and that a new trial be ordered. It must be conceded that appellee's rights in this court, in this regard, must be measured by its rights in the court below.

It is well settled that had the lower court ruled correctly on appellee's demurrer to the evidence, it would not have been entitled to ask for or to be granted a new trial,

5. since the damages were not assessed and all questions of fact, except on the assessment of damages, were foreclosed by the demurrer. *Strough v. Gear* (1874), 48 Ind. 100; *Ruddell v. Tyner* (1882), 87 Ind. 529; *Radcliff v. Radford* (1884), 96 Ind. 482; *Stockwell v. State, ex rel.* (1884), 101 Ind. 1; 2 Woollen, Trial Proc., §4154.

It is true, as appellee contends, that under the authority of §702 Burns 1908, §660 R. S. 1881, this court has frequently ordered a new trial where such new trial had

6. not been asked for. But in all such cases it will be found that the parties in whose favor the order for a new trial was made would have been entitled to make a motion for a new trial, if the lower court had correctly ruled against them on the question presented, and if such motion for a new trial presented an intervening error such new trial could correctly be awarded. But, as we have seen in this case, a correct ruling of the lower court would have left the parties where the mandate in this case puts them, with no right to ask for or to be granted a new trial, or to introduce any evidence except upon the measure of damages. This being true, this court has no legal authority to order a new trial, and to do so would not be the exercise of a sound discretion, but the exercise of arbitrary power.

Petition to modify mandate denied.

VANDALIA RAILROAD COMPANY v. MILLER.

[No. 6,693. Filed February 17, 1910.]

1. RAILROADS.—*Rights of Way.—Erection of New Fence.—Repairs.—Complaint.—Paragraphs.—Answer.*—Where one paragraph of a complaint against a railroad company seeks to recover the cost of erecting a new fence along defendant's right of way, and another, for the cost of repairing a fence along such right of way, an answer alleging that the notices given to such company—one for erecting a new fence, the other, for repairing an old one—were for the same fence and were so confusing that defendant could not determine what the plaintiff wanted the defendant to do, is bad, the defendant being presumed to know whether a new fence should be built, or the old one repaired. pp. 367, 368.
2. RAILROADS.—*Rights of Way.—Fences.—Statutes.—Construction.*—Sections 5448, 5449 Burns 1908, Acts 1885, p. 224, §§2, 3, requiring railroad companies to construct and keep in repair fences along their rights of way, are liberally construed together, and constitute a scheme to secure the fencing of railroad rights of way. p. 369.
3. APPEAL.—*Harmless Error.—Admission of Evidence.*—The admission of evidence designed to show the line of defendant's railroad, which does not prejudice defendant's rights, is harmless. p. 369.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Action by Emmaline Miller against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Albert D. Thomas, Michael E. Foley and John G. Williams, for appellant.

Joseph Combs, for appellee.

ROBY, J.—Appellee's complaint is in two paragraphs. The first one seeks to recover the cost of building a fence between the real estate of the appellee and the right of way of appellant railroad company, and a compliance is shown with the terms of §5448 Burns 1908, Acts 1885, p. 224, §2. The second paragraph counts upon a notice to repair a fence already constructed, and follows the terms of section three

of said act (§5449 Burns 1908). The sufficiency of each of these paragraphs is conceded. The appellant an-

1. swered, in substance, that the cause of action set up in each of the paragraphs of the complaint, was for the recovery of the value of the same line of right of way fence, and that the notices served upon the defendant, as averred in the first paragraph of the complaint—to the effect that the defendant had failed to fence its right of way—relate to the identical right of way fence as that referred to in the second paragraph of said complaint, in which it is averred, in substance, that, several years before the date of the service of the notice referred to in the second paragraph, the defendant had constructed a fence along the side of its right of way where the real estate of the plaintiff abuts thereon, and that for some years prior to said date said company had failed and neglected to keep said fence in repair, and that the itemized account of the cost of constructing the fence in question, as set out in each paragraph of said complaint, is for the identical line of fence and for the same material and labor.

The court sustained a demurrer to this answer, and such action is assigned as error. The contention is that notice having been served upon it, as averred in each paragraph, the appellant was unable to know whether the landowner would proceed to build a new fence or repair the old one.

This contention ignores the primary duty which rests upon the railroad company in this behalf. It was appellant's statutory duty to build and maintain fences of a prescribed character along both sides of its railroad. It was bound to know whether it had built such a fence, and it knew whether a fence built had been maintained. The serving of notices could not make any difference in these facts. If no fence had ever been built, its duty was to build one. If a fence once built had fallen into decay until it had ceased to serve its purpose, it had only to make necessary repairs in order to make all notices immaterial.

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The two sections are construed together, and furnish a complete statutory scheme to secure and maintain the fencing of railroads. *Terre Haute, etc., R. Co. v. Erdel*

2. (1904), 163 Ind. 348; *Chicago, etc., R. Co. v. Croy* (1904), 33 Ind. App. 461. The act is remedial, and should be liberally construed to effectuate its purpose. *Evansville, etc., R. Co. v. Huffman* (1904), 32 Ind. App. 425.

A correct disposition was made of the demurrer. Appellant could not possibly be harmed by a notice to repair a fence that did not exist, nor by the joining of a para-

1. graph of complaint upon which appellee was entitled to relief with one upon which she was not entitled to relief.

In support of the assignment that the court erred in overruling its motion for a new trial, appellant questions the admission of evidence designed to show the line of ap-

3. pellant's railroad. There was no substantial error in that regard. The evidence justified the finding that the fence was constructed on the line of appellant's right of way. *Vandalia R. Co. v. Stephens* (1906), 39 Ind. App. 11; *Evansville, etc., R. Co. v. Huffman, supra*; *Chicago, etc., R. Co. v. Wood* (1903), 30 Ind. App. 650.

The judgment is affirmed.

COLE CARRIAGE COMPANY v. HACKER ET AL.

[No. 6,704. Filed February 17, 1910.]

APPEAL.—*Weighting Evidence.—Breach of Contract.—Rescission.—Agency.—Ratification.*—Where a manufacturer of buggies contracted to sell and deliver to retailers a certain number of buggies, retaining the right to take possession of such buggies if such manufacturer felt insecure, and the buggies were shipped and the evidence was conflicting as to the manufacturer's retention of the goods, his sales agent later taking possession of such goods, and the manufacturer ever afterwards holding such possession and not offering to return or deliver such buggies to such retailers, a verdict for such retailers. In an action for breach of contract, will be upheld on appeal.

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From Blackford Circuit Court; *Charles E. Sturgis*, Judge.

Action by the Cole Carriage Company against Orange V. L. Hacker and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

Waltz & Secrest, for appellant.

Enos Cole, Elisha Pierce and *Jay A. Hindman*, for appellees.

RABB, P. J.—This was an action to recover damages for the alleged breach of an executory contract, for the purchase and sale of certain buggies, entered into between the parties. Issues were formed and a trial had resulting in a finding and judgment in favor of appellees.

The only question presented by the record is the sufficiency of the evidence to sustain the finding.

The complaint set up a written contract between the parties, by the terms of which the appellees, who were retail dealers in buggies, gave their written order to appellant, who was engaged in the manufacture and sale of buggies, for ten buggies, to be delivered by shipment to appellees, at Montpelier, Indiana, in time for exhibition at a county fair to be held there, which order was accepted in writing by appellant. The contract provided, among other things, that the order for the goods was not subject to countermand, except on the payment of twenty per cent liquidated damages, with the written consent of appellant, and that no agreement by a sales agent, unless in writing, and approved by some officer of the company, should be binding upon the company. It was provided that the title to the goods should remain in the appellant, who would have the right to resume possession of the property whenever it should feel insecure. The complaint averred the performance of the contract on appellant's part, and a refusal to accept the goods on the part of appellees. Appellee answered in two para-

graphs: (1) A general denial; (2) that, after the execution of the contract the appellant, in consideration of the payment by appellees of a certain note, executed theretofore by appellees to appellant, and which was not then due, released appellees from the obligations of the contract sued on.

Under the issues thus presented, every material fact alleged in the complaint and answer was in issue, and if the evidence, viewed in its most favorable light for appellees, fails to sustain every material fact averred in the complaint, or does sustain the material facts set up in the affirmative paragraph of answer, the judgment must be affirmed. The evidence discloses that sometime after the contract was executed, and about the time the goods were shipped, and while they were on board the cars at Montpelier, and before they had been accepted by appellees, a question arose as to the financial ability of the appellees to pay for the buggies. A confidential letter was written by one of the appellees to appellant on the subject, and some talk was had over the telephone, between the president of appellant company and one of the appellees, as to the possibility of appellant's sustaining loss if the goods were taken by appellees, and as a result of these negotiations, and before the complete execution of the contract by the acceptance of the goods by appellees, or a breach thereof by the refusal on the part of appellees to accept the goods, by mutual agreement between the parties, the appellant resumed possession of the goods, and has ever since held them.

One of the material averments in appellant's complaint was that the appellees refused to accept the goods. It was necessary to appellant's case that this fact should be made to appear. While there is some conflict in the evidence on the subject, there was an abundance of evidence to sustain the verdict that this material averment of the complaint was not true, and there was some evidence to sustain the affirmative paragraph of the appellant's answer. It is insisted by ap-

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pellant that what was done with reference to taking possession of the goods was done by appellant's traveling salesman, and was without authority of the firm. The contract expressly provided that no agreement by a sales agent, unless in writing and approved by some officer of the company, should be binding upon the company. Notwithstanding the written contract, the parties still possessed the right and power to make any kind of a contract they chose, in reference to the subject, either in writing or by parol.

Here it was shown that in the conversation had, over the telephone, between one of the appellees and appellant's president and general manager, in reference to the subject of the possession of the goods in question, the appellees were informed by the president that appellant's traveling salesman would see them and take up the matter with them. The traveling salesman did see them, took up the matter with them, and, in appellant's behalf, took possession of the goods. The appellant received the goods under this arrangement made with the traveling salesman, and still retains possession of them, and never afterwards offered to deliver them to appellees, and they cannot now be heard to say that their salesman acted without authority.

Judgment of the court below affirmed.

WILSON v. RECORD.

[No. 6,692. Filed February 18, 1910.]

1. **CONTRACTS.—Breach.—Complaint.**—A complaint by a subcontractor alleging that defendant contractor employed him to perform certain work, that he performed it, and that, at defendant's request, he performed certain extra work, and that for such service a certain sum was due and unpaid, is sufficient when attacked for the first time on appeal, such complaint being sufficient to bar another action for the same cause. p. 373.
2. **APPEAL.—Weighing Evidence.—Contracts.—Bonds.**—In an action against a city contractor and the sureties on his bond, evidence that the plaintiff performed services for such contractor and also

certain extra work, for which he had not been paid, is sufficient, on appeal, to support a verdict and judgment against such contractor, though the bond itself was not introduced in evidence. p. 374.

3. *APPEAL—Affirmance with Damages.*—Damages may be awarded upon the affirmance of a judgment on appeal. p. 374.

From Howard Superior Court; *Patrick H. Elliott*, Judge.

Action by Adam Record against John W. Wilson. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Blacklidge & Wolf, for appellant.

John C. Joyce and *Joseph C. Herron*, for appellee.

RABB, P. J.—Appellant entered into a contract with the city of Kokomo for the construction of certain cement sidewalks in the city, and, to secure the performance of the contract on his part, executed to the city a bond in the penalty of \$4,400, with certain named parties as sureties thereon, conditioned for the faithful performance of the contract on his part. After said contract had been entered into between appellant and the city, appellant and appellee entered into a written contract, by which appellee contracted to perform certain parts of the work, included in the original contract between the city and appellant, for which he was to be paid a certain named price.

This action was originally brought against appellant and the sureties named in the bond given to the city. The complaint averred the making of the contracts before mentioned and the execution of the bond by appellant and sureties to the city, and copies of each of the contracts and of the bond were filed with and made parts of the complaint. It was further averred in the complaint that the work had been completed and had been accepted by the city, and that the appellee had performed all of the conditions of the sub-contracts on his part, and, in addition thereto, it was averred that, at the special instance and request of appellant, appellee performed certain extra work in connection with the making of said improvements, which work was not included

within the terms of the contract between appellant and appellee, and that there was due from appellant to appellee, on account of the work done by him under said written contract between them, and said extra work done by appellee at appellant's instance and request, the sum of \$252.65, and judgment was prayed against all of the defendants for the amount due to appellee from appellant. The case was put at issue and submitted to a jury for trial, but before the verdict was returned the cause was dismissed as to all the defendants except appellant. The trial resulted in a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict against appellant.

It is insisted that the judgment below should be reversed:

- (1) Because the complaint fails to state a cause of action;
- (2) because the evidence is insufficient to sustain the verdict, and
- (3) because the court erred in permitting appellee to make proof of the extra work alleged to have been done by him at appellant's request.

No exception was taken by appellant to the complaint by demurrer, and the question of its sufficiency upon any theory is presented for the first time in this court. It is

1. appellant's contention that the complaint is bad, for the reason that it is predicated upon the bond given by the original contractor to the city, and that the facts averred failed to show a right in appellee to maintain an action on the bond, and that such being the theory of his case he cannot be permitted to wage his action upon one theory and recover upon another. It may be conceded that appellee's complaint fails to state facts sufficient to make out a case for him upon the bond given by appellant to the city, but it does aver ample facts to show a right of recovery in appellee against appellant for all the work done by appellee, both under the written contract between the parties and the extra work alleged to have been done by appellee at appellant's instance and request. The appellant joined issue

upon this complaint and went to trial. He took a chance to win or lose, and there can be no question that if the appellant had recovered judgment against appellee upon the issues thus formed, such judgment would have been a complete bar to another action by appellee to recover for the work alleged in the complaint to have been done by appellee under the written contract and at the appellant's request. Such being the case, he cannot now be heard to question the theory of appellee's complaint. *Board, etc., v. Chipps* (1892), 131 Ind. 56, 16 L. R. A. 228; *Bedford Belt R. Co. v. Brown* (1895), 142 Ind. 659; *Duffy v. Carman* (1891), 3 Ind. App. 207; *Cleveland, etc., R. Co. v. Baker* (1900), 24 Ind. App. 152; *Efroymson v. Smith* (1902), 29 Ind. App. 451.

For the same reason, appellant's contentions that the evidence is insufficient to sustain the verdict, and that the court erred in the admission of proof of extra work

2. alleged to have been done by the appellee, must fail.

There was sufficient evidence to show that there was something due to the appellee from appellant, on account of work done by him, under the written contract alleged in the complaint to have been made between the parties, and that appellee did certain work, not provided for in the contract, at the special instance and request of the appellant, and for which the appellant was indebted to him. The sole ground upon which it is contended that the evidence is insufficient to sustain the verdict is that the complaint was predicated upon the bond in suit, and that the bond was not introduced in evidence. This contention cannot prevail on this appeal. for the reason heretofore stated, and, for the same reason, appellant's objection to the proof of extra work, permitted by the court to go to the jury, must go down.

3. The judgment of the court below is affirmed, with ten per cent damages.

FLETCHER v. NICHOLSON, ADMINISTRATOR.

[No. 6,698. Filed February 18, 1910.]

1. DECEDENTS' ESTATES.—*Failure to Make Final Settlement of.—Effect.*—An estate in which no final settlement has been made, must be considered as pending until the completion of the business and the discharge of the administrator. p. 376.
2. EXECUTORS AND ADMINISTRATORS.—*Report.—Discharge.*—In the absence of any record of final settlement, an administrator may be required by the court to make a report. p. 376.
3. DECEDENTS' ESTATES.—*Settlement. — Distribution. — Administrators.—Interest.—Special Findings.*—Where the special findings, in an action by an heir against the administrator for his distributive share of the estate in question, show the amount of such share, that it was not paid to such heir or to anyone authorized to receive it, and that such heir was responsible for the delay in payment, such heir should recover his share without interest. p. 377.
4. DECEDENTS' ESTATES.—*Desperate Claims.—Liability for.—Laches.*—Where an administrator reports certain claims on behalf of his decedent as desperate, an heir cannot hold him liable therefor in an action filed thirty-seven years thereafter. p. 377.

From Henry Circuit Court; *Ed Jackson*, Judge.

Final report of Josiah P. Nicholson, as administrator of the estate of James W. Fletcher, deceased, to which Thomas Fletcher excepts. From a judgment against the exceptor, he appeals. *Reversed.*

William O. Barnard and *William E. Jeffrey*, for appellant.

Horace G. Yergin, *Paul Brown* and *William A. Brown*, for appellee.

ROBY, J.—The issues in this case are made by appellant's exceptions to the "second final settlement" of Joseph P. Nicholson, as administrator of the estate of James W. Fletcher, deceased. The court made special findings and stated conclusions of law thereon. It appears from the findings that the decedent departed life in March, 1870, and that appellee was duly appointed administrator on March

19, 1870; that he qualified and entered upon the discharge of his duties, filed his inventory, and on July 4, 1872, filed a partial report, and in August, 1873, a second partial report; that prior to March 7, 1879, "he made a final settlement of said estate, and paid \$8 to the clerk of the Henry Circuit Court for filing and making a complete record of said final settlement, but that it does not appear upon the record, and has either been lost or destroyed;" that the "second final report" was made in obedience to a citation issued February 4, 1907; that the heirs of the decedent were his four brothers, of whom appellant was one; that his claim is that he is now entitled to recover his distributive share of said estate, and that certain notes for which credit is asked, as being desperate, were collectible and should be accounted for; that the appellant left Henry county in 1857; that he never communicated with any members of his family after that time; that he made no effort to learn of his brother's death; that the administrator advertised for him in Indianapolis, Cincinnati, and local newspapers, without result; that he returned to Indiana in 1905, and asked a citation against appellee in 1907. It thus appears that it took appellant thirty-seven years to learn of his brother's death. Solicitude which is so long in coming to existence, and which at last concerns itself with a distributive share of an estate already once paid to a member of the family, naturally fails to arouse much enthusiasm on the part of bystanders. The facts found do not show a final settlement of the

1. estate. It must be regarded as still pending until the ultimate completion of the business and the discharge of the administrator by the court. *Dufour v. Dufour* (1867), 28 Ind. 421; *Parsons v. Milford* (1879), 67 Ind. 489; *Beedle v. State, ex rel.* (1878), 62 Ind. 26.

There is no finding that the administrator was ever
2. discharged, and, in the absence of a record to that effect, the court had authority to require a report as it did. *Mefford v. Lamkin* (1906), 38 Ind. App. 33.

This report shows appellant's distributive share to be \$375. The finding is that this sum was not paid to him or to any person authorized to receive it for him.

3. The findings show that appellant is himself responsible for the delay. He is not therefore entitled to interest. The administrator has not "improperly kept the beneficiary out of the use of his money." *Dufour v. Dufour, supra.*

The findings also contain facts from which it is contended that the court should have found against the appellee as to his failure to realize on the certain specified notes.

4. After thirty-seven years, the difficulty of determining a disputed claim of insolvency, of the nature here presented, is very great. The element of uncertainty thus voluntarily introduced into the case by appellant justifies the conclusion of the court on that issue.

The judgment is reversed and the cause remanded, with instructions to restate conclusions of law in appellant's favor for \$375.

DODD v. SHANTON ET AL.

[No. 6906. Filed February 23, 1910.]

1. DESCENT AND DISTRIBUTION.—*Widows.—Childless.*—Prior to the act of 1899 (Acts 1899, p. 131), a childless second wife took a fee simple in one-third of her husband's real estate, but his children by a former marriage, or their descendants, became her forced heirs. p. 381.
2. DESCENT AND DISTRIBUTION.—*Widows.—Childless.—Forced Heirs.—Husbands of.*—Where a daughter by a former marriage is the expectant forced heir of her father's childless second wife, and she, together with her only child, predeceases such childless second wife, her husband takes no interest in such land, the act of 1901 (Acts 1901, p. 554) providing that the children, or their descendants, shall become such heirs. p. 381.
3. DESCENT AND DISTRIBUTION.—*Widows.—Childless.—Heirs of.—Law Governing.*—The law in force at the death of a childless second wife governs as to the persons who shall be her heirs. p. 381.
4. DEEDS.—*Partition.—Childless Second Wife.—Forced Heirs.*—A deed by a childless second wife's expectant forced heir—a child

by the husband's former marriage—to such wife merely for the purpose of partitioning such husband's land, conveys no additional title. p. 381.

5. DEEDS.—*Consideration*.—*Expectant Forced Heirs of Childless Second Wife*.—*Estoppel*.—A deed from the expectant forced heirs of a childless second wife, of the land to be inherited, in trust for the benefit of the grantors, does not preclude such grantors, under §3020 Burns 1908, Acts 1899, p. 131, §3, estopping such children when a deed is executed thereto supported by a valuable consideration, from claiming such lands. p. 381.

6. JUDGMENT.—*Partition*.—*Title*.—*Childless Second Wife*.—*Heirs of*.—In a suit, for partition, by a childless second wife against the descendants of a child of her husband by a former marriage, including the husband of a deceased daughter, a decree dividing the land and providing that the plaintiff shall hold the fee of a certain part and that such part should descend to such children, or their descendants, as such widow's forced heirs, gives to such husband no right as an heir. p. 382.

From Superior Court of Marion County (70,967); *John L. McMaster*, Judge.

Suit by Frank Dodd against Ella F. Shanton and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

William Bosson and *John W. Claypool*, for appellant.

Morris M. Townley, for appellees.

ROBY, J.—Suit by appellant for the partition of real estate. Verdict and judgment for appellee. The overruling of appellant's motion for a new trial is the only assignment of error that needs to be considered. The facts are not in dispute. They are as follows: In 1878, Lorenzo Van Seyoc died intestate, seized of certain real estate in Marion county. He left surviving him as his sole heirs a childless second wife, Esther Van Seyoc, and a daughter by a previous marriage, Almira Mustard. Shortly after his death there was an amicable partition between the widow and the daughter and an interchange of deeds, the widow deeding to the daughter a parcel of 187 acres, and the daughter deeding to the widow a parcel of 182 acres. Both deeds recited that they were executed to confirm the partition. The

conveyance from the widow to the daughter was an ordinary conveyance in fee simple. The conveyance from the daughter to the widow purported on its face to convey only a life estate. This is the parcel of land in controversy. The parcel which was conveyed by the widow to the daughter is not in controversy. On June 22, 1899, Almira Mustard executed a conveyance in trust to Henry M. Hessong. This conveyance not only described the real estate then owned by Almira Mustard, but also the real estate owned by Esther Whiting, formerly Esther Van Scyoc, the widow of Lorenzo Van Scyoc. By the terms of the trust deed Hessong was to hold the real estate in trust for Almira Mustard during her life with remainder to her children. The deed furthermore provided that "the active duties of the trustee herein named shall not commence as to the Whiting property hereinbefore named until the termination of the life estate to which the same is now subject." Under this instrument of trust, Hessong, as trustee, took possession of the parcel not in controversy. The parcel in controversy remained in the possession of Esther Whiting. On June 9, 1900, Almira Mustard died, leaving surviving her six children, namely: Ella F. Shanton, Rebecca J. Hessong, Cora F. Hessong, Mary E. Harcourt, Fanny F. Johnson and Josie M. Dodd. On July 9, 1910, the daughters of Almira Mustard, their husbands joining, executed an instrument wherein Henry M. Hessong was continued as trustee pursuant to the terms of the trust deed executed by Almira Mustard on June 22, 1899. By the terms of this instrument the trust before referred to was to continue until Hessong collected sufficient rents to discharge certain liabilities of the estate of Almira Mustard. Subsequent to the execution of the supplemental trust agreement before referred to, and during the year 1900, Josie M. Dodd, one of the children of Almira Mustard, died intestate. She left surviving her a child and her husband, Frank Dodd, appellant herein. The child survived its mother but a few days, leaving appellant as its sole heir.

On January 24, 1901, Esther Whiting in instituted a suit against all of the appellees and against appellant Frank Dodd, seeking to quiet her title to the parcel of the real estate in controversy. There was an appearance by all defendants, including Dodd, and answers in general denial were filed. This cause came on for trial, and the court made a special finding of facts and stated its conclusions of law thereon. It was found that Lorenzo Van Scyoc had died seized of certain real estate, of which there had been an amicable partition between his widow and his daughter; that, in order to confirm such partition, deeds had been exchanged whereby the parcel in controversy had been conveyed to the widow, and the parcel not in controversy conveyed to the daughter. The court concluded that as the result of such partition the widow, Esther Whiting, was the owner of the parcel in controversy in fee simple, subject to the qualifications that as a childless second wife her fee simple ownership would terminate at her death, provided there might be alive at that time any of the children of Lorenzo Van Scyoc by his previous marriage, or any of the descendants of such children; that in the event of the death of Esther Whiting, leaving such children or their descendants surviving her, the real estate in controversy would descend to such children or their descendants as the forced heirs of Esther Whiting. A decree followed, quieting the title of Esther Whiting in fee simple, subject to the qualifications before mentioned. The date of this decree was January 18, 1902. On June 5, 1903, Henry M. Hessong, trustee, having accomplished the purpose of the supplemental trust agreement of July 9, 1900, executed a conveyance of the parcel not in controversy to the beneficial owners thereof. Appellant, having inherited from his wife and his child a fractional part of this parcel, was one of the grantees therein.

The childless second wife inherited from her husband the fee of the land in controversy, and his children or their

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descendants living at her death became her heirs to
 1. such land. *Utterback v. Terhune* (1881), 75 Ind. 363; *Bateman v. Bennett* (1903), 31 Ind. App. 277; *Fry v. Lawson* (1904), 32 Ind. App. 361.

The appellant was not one of the husband's children. His wife, who was one of the children, departed life before the widow, as did their only child, and the appellant is
 2. not entitled to any part of the land under the rule of descents declared by the cases cited, either immediately or otherwise. The acts of 1899 and 1901 changed the rule of descent. Acts 1899, p. 131, §1, Acts 1901, p. 554, §§3018, 3019 Burns 1908.

The children of the husband were expectant heirs only, and their estate is fixed by the law in force at the
 3. death of the wife. *Burget v. Merritt* (1900), 155 Ind. 143, 147.

Neither appellant's wife nor his child acquired any interest in the land in dispute, and he could not take from them that which they never had under the statute,
 2. any more than by the law of the case of *Utterback v. Terhune, supra*. This brings us to a consideration of the effect of the deeds and decree quieting title. The deeds between Almira Mustard and her father's sec-

4. ond wife conveyed no additional title, it being recited therein that such deeds were executed to confirm partition. *Habig v. Dodge* (1891), 127 Ind. 31; *Bumgardner v. Edwards* (1882), 85 Ind. 117; *Moore v. Kerr* (1874), 46 Ind. 468; note to *Cottrell v. Griffiths* (1901), 57 L. R. A.

332. The deed from Almira Mustard to Hessong, in trust for the benefit of the persons named, does not come
 5. within the provision of section three of the act of February 24, 1899 (Acts 1899, p. 131, §3020 Burns 1908), for the reason that it is not made to appear that said lands were conveyed for a valuable consideration, nor that Almira Mustard received payment therefor. The recitals

of the deed are as follows: "The grantor is of feeble health and physically unable to care for her landed interest, and is desirous of placing the same in the hands of a trustee to care therefore during her life, for her benefit, and to dispose of the fee simple upon the termination of her life estate. Now, therefore, in consideration of \$1 in hand paid to the grantors herein and other sufficient consideration," etc. The purpose of §3020, *supra*, was to stop the unconscionable practice of recovering the land by the heir after he had once been paid for it. *Burget v. Merritt* (1900), 155 Ind. 143. One desiring the benefit of the statutory estoppel must bring himself within its provisions. Neither appellant nor his wife is shown to have parted with any value as a part of this transaction, and neither the letter nor the reason of the act is available to appellant.

The decree quieting title was in favor of the widow under whom appellees claim. It did not and could not change the statute of descents. It conferred no right upon ap-

6. pellant's wife, but was against her as to any then-present title. The motion for a new trial was properly overruled.

The judgment is affirmed.

NEW LONG DISTANCE TELEPHONE COMPANY

v. WHITE ET AL.

[No. 7,079. Filed February 23, 1910.]

1. **TRIAL**.—*Permission to File Answer After Beginning of.*—*Telephones.*—*Erection.*—*Damages.*—In a suit to restrain property-owners from interfering with a stub telephone pole, it is not harmful to the plaintiff for the trial judge, after the trial has begun, to permit defendants to file an additional paragraph of answer, alleging that the company had no right to erect such pole, that it was an obstruction to their property, and that they were damaged thereby, the judgment giving no damages on such account. p. 386.

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2. **APPEAL.**—*Erroneous Admission of Evidence.*—*New Trial.*—The erroneous admission of evidence, where not made a ground for a new trial, is not available on appeal. p. 386.
3. **INJUNCTION.**—*Telephones.*—*Interference With.*—*Decree.*—*Motions to Modify.*—Where the court found against defendants as to both the complaint and the answer, in a suit to restrain them from interfering with plaintiff's telephone pole and from interfering with the erection of a new one, the defense being that such pole obstructed defendants' enjoyment of their property, and the decree merely forbade defendants from interfering with the existing pole, but forbade the plaintiff from erecting a new one, a motion to modify such decree so as to allow the plaintiff to erect a new pole should be sustained. p. 387.
4. **APPEAL.**—*Mandate.*—*When Judgment Ordered.*—The Appellate Court will order a final judgment where justice requires it. p. 387.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Suit by the New Long Distance Telephone Company against Julia White and another. From the decree entered, plaintiff appeals. *Reversed.*

Milton L. Clawson, for appellant.

COMSTOCK, J.—Appellant brought suit against appellees to enjoin them from interfering with the location, erection and maintenance of a stub pole and anchor in the street in the town of Cicero, Indiana. The complaint, in substance, alleges that the plaintiff is a corporation organized and operating a system of long distance telephone lines along and over the streets and alleys of said town, under a franchise granted by the town board of said town to the Cicero Telephone Company, and by it transferred to plaintiff for the consideration of \$—— by a conveyance, a copy of which is incorporated in the complaint; that said telephone lines extended from the exchange in said town to the village of Baker, in said county; that, acting under the order of the town marshal and in accordance with the instructions of the trustees of said town, plaintiff attempted to locate and establish a stub telephone pole adjoining the property belonging

to the defendants, located on the north side of Jackson street in said town, at a point wholly upon the public highway; that the defendants then and there forbade said plaintiff so to place and to maintain said pole, and still forbid it from so doing, and prevent it from locating and maintaining said pole; that the plaintiff is maintaining a system of long distance telephone lines over the State of Indiana and adjoining states, and said lines connect with the exchange board of the Cicero Telephone Company, now owned by the plaintiff; that said telephone system is connected with 106 subscribers in and around Cicero, and is a part of the general system of said telephone lines; that leading from the plaintiff's local exchange board at Cicero, east on Jackson street in said town, there is a lead on the north side of said street with five cross-arms and fifty wires, which are attached to and fastened upon a large pole belonging to said plaintiff on the north side of said street at the junction of said north Jackson street with the west line of the first alley west of the property of the defendant, Julia White; that the weight of said wires at said junction is 5,000 pounds, and that the only support and anchorage said pole and wires have at present is a stub pole and anchorage upon the highway of said Jackson street immediately east of the east line of said alley north of Jackson street, and said stub pole and anchorage now located at said point are decayed and insufficient to guy up the lead at said point, and that if said pole and anchorage remain in their present defective condition they are liable to fall, bringing down fifty or more wires which are connected with the cross-arms on said pole, and then and there endangering the lives and limbs of the public now using said highway; that if said wires and pole fall at the present time they will fall upon the house and premises first west of the property of defendants: that the trolley wires of the Indiana Union Traction Company run north and south of the first street west of said

alley, and directly under said wires on plaintiff's said lead supported by said decayed, worn and defective stub pole, and there is actual and immediate danger of the falling of said wires upon said trolley wires of said traction company; that said traction company's wires are highly charged with electricity and are unprotected, and if plaintiff's lead should fall, as aforesaid, the electric current from said trolley wires would be communicated to the wires of said plaintiff, and its exchange board and its numerous subscribers, and would set fire to and damage the exchange board, and damage and injure the telephones in the homes of plaintiff's subscribers, and would greatly endanger the residences of the subscribers in said town; that, in order to make said lead safe and secure at said point to hold said wires, it is necessary immediately to place a new anchorage and stub pole on Jackson street in front of the property of defendant, Julia White. Plaintiff asks that they be perpetually enjoined and for damages in the sum of \$100.

A demurrer for want of facts to the complaint was overruled and the case put at issue by general denial. After part of the evidence was heard, over the objections of plaintiff, defendants, by permission of the court, filed a second paragraph of answer, in substance as follows: That plaintiff is a corporation duly organized and doing business in the State of Indiana; that on September 7, 1906, plaintiff erected and set a stub pole and anchor rod in the lawn in front of defendant White's property in the town of Cicero, Indiana, and that it was done without her consent and against her will; that plaintiff did not have a legal and valid franchise to locate and set said poles and operate a telephone plant in the town of Cicero, Indiana; that the locating, setting and maintaining of said stub pole and anchor, together with appurtenances, would greatly damage the free use and enjoyment of said defendant's property, and that said action was without any compensation on the part of

plaintiff. A demurrer for want of facts was overruled to said paragraph.

The errors assigned and relied upon for reversal are: (1) The court erred in allowing the filing of appellees' second paragraph of answer over appellant's objection; (2) in overruling appellant's demurrer to the second paragraph of answer; (3) in overruling appellant's motion to modify judgment; and (4) in overruling appellant's motion for a new trial.

The court committed no error as to the first two specifications assigned, but, in any event, the appellant was not harmed thereby, because there was no proof of dam-

1. ages made by any recognized rule for the measure of damages and no judgment for damages was rendered against appellant.

The action of the court in admitting and excluding certain evidence is excepted to, but such rulings are not available, because they are not made grounds for a new trial.

2. That the judgment of the court is not sustained by sufficient evidence and that it is contrary to law are the only reasons assigned for a new trial. The court finds generally that the allegations of the complaint are true, that the plaintiff is entitled to a permanent and perpetual injunction enjoining the defendants and each of them from interfering with or in any way molesting said stub pole placed in said position, in pursuance of a temporary restraining order granted by the trial court on September 8, 1906, and now maintained by plaintiff upon said street in front of defendant White's said premises, and that plaintiff is not entitled to maintain the anchor and anchor wire now attached to said stub pole and used as a stay or brace therefor. In accordance with the general finding, a decree was entered that the defendants and each of them and all persons claiming by, through or under them, or either of them, be and are hereby permanently and perpetually enjoined from in any way interfering or molesting the stub pole now

maintained by plaintiff in said street, and that the plaintiff is granted thirty days from this date within which to remove the anchor and the anchor wire running from the ground to said stub pole, etc. It was further ordered that the plaintiff recover of the defendants its costs occasioned by the filing of the complaint, issuing and serving summons and writ of temporary restraining order and the costs made by defendants in summoning their witnesses, and the witness fees of said witnesses, which costs and fees are taxed at \$—, and that the defendant recover of the plaintiff all other costs in this cause, taxed at \$—. The evidence, without conflict, sustains the material allegations of the complaint. It is also shown, without conflict, that the ingress to and egress from appellees' premises were not and will not be in any way interfered with by the location and maintenance of said pole and anchor.

Appellant moved that the court modify the foregoing judgment, in this: that the plaintiff be entitled to erect and

maintain said stub pole and anchor at the point and

3. places mentioned in plaintiff's complaint, and as prayed for therein, that said defendants, and each of them, be permanently and perpetually enjoined from in any way interfering with the location, erection and maintenance of said stub pole and anchor at the places mentioned and prayed for in said plaintiff's complaint, that the court enter a decree in accordance with the allegations of plaintiff's complaint and the prayer for relief prayed for therein, and that a judgment be rendered against defendants for all costs.

The motion to modify should have been sustained. We have no reason to conclude that any useful purpose would be subserved by another trial. The judgment is there-

4. fore reversed, with instructions to the trial court to sustain appellant's motion to modify the judgment, said modification not to allow appellant damages, as prayed in the complaint.

VANCLEEF ET AL. v. BRITTON, RECEIVER.

[No. 7,416. Filed February 23, 1910.]

1. **APPEAL.**—*Assignments of Errors.—Joint Complaint.*—A joint assignment, on appeal, that the plaintiff's complaint is insufficient, should be overruled, where the complaint is sufficient as to any of the defendants. p. 389.
2. **MORTGAGES.**—*Foreclosure.—Parties.—Assignees.*—A mortgagee is entitled to a decree of foreclosure against not only the mortgagor, but also his assignees. p. 389.
3. **ABATEMENT.**—*Plea in.—Another Action Pending.—Receivers.—Settlements.—Fraud.—Maintaining Independent Action.*—In a suit by a receiver to foreclose a mortgage against a person who had purchased certain property from such receiver, a plea in abatement alleging that the receiver had defrauded such purchaser, and that such purchaser had filed a petition in the receivership proceeding praying for relief because of such fraud, and that such petition was filed before the receiver filed the suit for foreclosure, is bad. p. 390.
4. **JUDGMENT.**—*Defective.—Motion to Modify.*—The remedy for the erroneous rendition of a personal judgment, in a foreclosure suit, is a motion to modify. p. 390.

From Superior Court of Marion county (76,209); *John L. McMaster*, Judge.

Suit by Charles O. Britton, as receiver of the Hoosier Sand and Gravel Company against Charles H. Vancleef and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Barrett & Barrett, for appellants.

Gavin, Gavin & Davis and *Frank C. Olive*, for appellee.

RABB, J.—The appellee was, by order of the Superior Court of Marion County, in a certain action therein pending, appointed receiver for the Hoosier Sand and Gravel Company, a corporation, and upon the order of said court the appellee, as such receiver, sold to appellant Vancleef certain personal property, and as a part of the consideration therefor took the notes of appellants Vancleef and the Cincinnati Gas, Coke, Coal and Mining Company, secured by mort-

gage on the property sold, and certain real estate therein described. After the sale the mortgaged property was, with the consent of appellee, sold and delivered by appellant Vancleef to appellant Marion County Sand and Gravel Company.

This suit was, on leave of said court appointing appellee as receiver, instituted to recover on said notes and to foreclose the mortgage given to secure them, and all of the appellants were made parties thereto. The appellants filed a plea in abatement, a demurrer to which was sustained by the court. Appellant Marion County Sand and Gravel Company answered to the merits. No answer was made to the merits by appellants Vancleef and the Cincinnati Gas, Coke, Coal and Mining Company. A reply was filed by appellee to the Marion County Sand and Gravel Company's answer, and the cause was submitted to the court for trial. There was a finding and personal judgment in favor of appellee against all of the appellants for the amount due on the notes sued on, and a decree for the foreclosure of the mortgage securing them.

The errors relied upon for reversal call in question the sufficiency of the complaint to state a cause of action against appellant Marion County Sand and Gravel Company, the action of the court in sustaining the appellee's demurrer to the answer in abatement, and the rendition of judgment against appellant Marion County Sand and Gravel Company.

All of the appellants join in the assignment of error, and for this reason, if for no other, the objection pointed out to the complaint would be overcome, as no question is

1. made but that it states a good cause of action as to the parties to the note, but it was also sufficient to withstand the demurrer as against appellant Marion
2. County Sand and Gravel Company. Appellee was entitled to a foreclosure of its mortgage against all the parties.

The plea in abatement set up the fact that the proceeding in which the appellee was appointed receiver was still pending in the Superior Court of Marion County, and

3. that the purchasers of the property for which the notes sued on were given had been induced to make said purchase by reason of certain representations alleged to have been made to them by such receiver, and which were claimed to be false, and upon which representations a charge of fraud was predicated against the receiver. It is averred that the appellants had filed a petition in the court wherein said receivership was pending, asking to be allowed certain deductions from the purchase price of said property as a credit upon said notes, on account of said alleged fraud, and that, pending such petition, the appellee had, without notice to appellants, or any knowledge upon their part, procured leave of court to institute this suit, the theory of the answer in abatement being that the filing of such petition constituted the pendency of a prior action involving the same questions presented by the pleadings in this case. This position cannot be sustained. The filing of the petition was in no sense the commencement of an action within the meaning of the rule that would abate a civil action regularly instituted upon the notes. The court was not bound to take cognizance of appellants' petition, and might very properly ignore the petition, and, without notice to appellants, direct, as was done in this case, a suit to be instituted upon the notes, where the question of the appellants' right to defend against the notes or any part thereof, for any cause, could be properly presented for adjudication. There was no error in sustaining the demurrer to the plea in abatement.

It is contended that the cause should be reversed because a personal judgment was rendered against the Marion County Sand and Gravel Company, and that the

4. complaint did not authorize a personal judgment against said appellant. No motion was made to

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modify the judgment in the court below, and appellants' remedy for an error of this character was by motion to modify.

No error appearing in the record, the judgment of the court below is affirmed.

MIAMI COAL COMPANY v. KANE.

[No. 6,862. Filed December 7, 1909. Rehearing denied February 23, 1910.]

1. **MASTER AND SERVANT.—Coal Mines.—Props.—Assumption of Risk.—Instructions.**—An instruction that a coal miner who works, knowing that the master has failed to furnish props or timbers with which to secure his roof, is not thereby precluded from a recovery for injuries sustained thereby, and that the risks assumed by the miner are those only which occur after the master has performed the duties imposed by law, is correct. p. 393.
2. **MASTER AND SERVANT.—Coal Mines.—Imposed Duties.—Contributory Negligence.—Instructions.**—An instruction that the mining statute (§8580 Burns 1908, Acts 1905, p. 65, §12) was designed to protect miners not only from apparent, but also from remote and latent dangers, and that a miner injured because of a violation of such statute can recover therefor, unless he has notice of imminent or immediate danger, is not erroneous. p. 393.
3. **MASTER AND SERVANT.—Coal Mines.—Defective Roofs.—Notice.—Assumption of Risk.—Instructions.**—The refusal to give an instruction that if a servant in a coal mine knew of a defective and dangerous condition in the roof of his room and failed to notify the mine boss thereof, and continued to work in such defective and dangerous room, he cannot recover, is not prejudicial to defendant, where another instruction covered the subject of contributory negligence. p. 394.
4. **MASTER AND SERVANT.—Coal Mines.—Violation of Rules or Law by Servant.—Contributory Negligence.**—The violation of a rule by a servant, which contributes to such servant's injury, prevents a recovery by such servant. p. 395.
5. **MASTER AND SERVANT.—Violation of Statute or Rules.—Contributory Negligence.—Proximate Cause.**—The violation of a statute, or the rule of his master, by the servant, precludes a recovery of damages by him, where such violation was the proximate cause of the injury. p. 395.

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6. MASTER AND SERVANT.—*Coal Mines.—Statutes.—“Unsafe Place.”—Contributory Negligence.—Question for Jury.*—Whether a servant is guilty of contributory negligence in failing to notify the mine boss of an “unsafe place” (§8580 Burns 1908, Acts 1905, p. 65, §12), of which he has knowledge, or in remaining in an “unsafe place,” after notice, is a question for the jury. p. 396.

From Putnam Circuit Court; *John M. Rawley*, Judge.

Action by Lawrence Kane against the Miami Coal Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Lamb, Beasley & Sawyer and *S. A. Hays*, for appellant.
A. C. Miller, George A. Knight and *G. S. Payne*, for appellee.

COMSTOCK, J.—Appellee brought this action to recover damages for personal injuries alleged to have been sustained by appellee while in the employ of the appellant as a coal miner working in appellant's mine, because of the alleged negligence of appellant in failing to visit appellee's working place through its mine boss, to supply a blackboard upon which appellee could register his request for timbers, and to furnish appellee with suitable props and timbers at his working place, to secure the roof of his room, as a result of which alleged negligence the roof of appellee's working place caved in and caused the injuries complained of. Appellant's demurrer to the amended complaint for want of facts was overruled and appellant answered by a general denial. A trial by jury resulted in a verdict for \$3,000 in favor of appellee. Judgment was rendered upon the verdict, and appellant's motion for a new trial was overruled. This action of the court is relied upon for a reversal of the judgment.

The only reasons for a new trial discussed were the giving to the jury of instructions nine and ten, requested by appellee, and the refusal to give instruction nine, requested by appellant.

Said instruction nine, given, informed the jury that the

continuing of a miner in the employ of the owner or operator of a coal mine, with knowledge of the fact that such

1. owner or operator is guilty of a breach of duty to furnish props or timbers with which to secure the roof of the working place of such miner, would not prevent a recovery for an injury suffered by such miner by reason of such breach of duty on the part of the owner or operator, and that the risks which a miner assumes on entering upon his employment are those only which occur after the due performance by the employer of those duties which the law imposes.

Said tenth instruction told the jury that the duty of furnishing props, etc., was imposed by statute; that the statute was designed to protect the employes in mines from

2. dangers not only apparent, but also those remote and not apparent; that such safeguards are required by law, and, in the absence of notice of imminent or immediate danger, an employe is not required to quit work because the operator fails to comply therewith, but if, while in said employment, he is injured because of such failure, it is no defense to an action brought for injury or death to prove that such operator neglected to perform its duty in that behalf, and that such miner had knowledge of such fact. These instructions are sustained by numerous decisions of this State. The risks assumed by the servant are only such as arise after the master has discharged his statutory duty. *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413; *American Rolling Mill Co. v. Hullinger* (1904), 161 Ind. 673; *Island Coal Co. v. Swaggerty* (1903), 159 Ind. 664; *Monteith v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 58 L. R. A. 944; *Davis Coal Co. v. Pollard* (1902), 158 Ind. 607, 92 Am. St. 319; *Hochstetler v. Mosier Coal, etc., Co.* (1893), 8 Ind. App. 442; *Buehner Chair Co. v. Feulner* (1902), 28 Ind. App. 479.

Said instruction nine, requested by appellant, reads as

follows: "The law makes it the duty of one working in a coal mine, when he shall learn of an unsafe place,

3. to notify the mine boss thereof, and to take a receipt from such mine boss acknowledging the unsafe condition so reported. The law also makes it the duty of such person, after having reported such unsafe condition, not to return to work at such unsafe place until permission to do so shall have been given him by the mine boss. So in this case, if you find from a preponderance of the evidence that the plaintiff's room wherein he was assigned to work had become defective and dangerous because of the defective condition of the roof of said room, that the plaintiff knew of such defective and dangerous condition and failed to notify the mine boss of such dangerous and defective condition, but, with knowledge thereof on his part, continued to work in the room assigned to him and under such dangerous and defective roof, and was thereby injured because of such defective and dangerous condition of said roof, said acts upon the part of the plaintiff would be acts of negligence contributing to his injury. And if you so find, the plaintiff is not entitled to recover. and your finding should be for the defendant."

Appellant insists, not that the appellee had knowledge of some failure upon the part of the appellant to furnish props—the question of timbers or props was not involved in the instruction—but that he had knowledge of a dangerous condition existing in his working room, of such a character that it was his duty, under a positive statute, to inform the mine boss of the defective condition of his room, and to refuse longer to work therein until it had been made safe. The following is the evidence of appellee's knowledge of the dangerous condition of the roof: Very shortly after the appellee had been injured, and before he had been removed from the mine, a fellow miner asked him the following: "Didn't you know that that slate was bad?" To which he

answered: "Yes, Mr. James, I knew it was, but I thought I could get that little shot off till I had timber—till the timber came." This evidence was contradicted by appellee. Appellee testified that on the morning of the accident he sounded the roof. He put one hand against the roof and hit it with a pick to tell whether it was sound; sounded it all over the room he expected to work under, and the roof appeared to be solid.

The statute provides (§8580 Burns 1908, Acts 1905, p. 65, §12): "Whenever any person working in said mine shall learn of such unsafe place he shall at once notify the mine boss thereof and it shall be the duty of said mine boss to give him, properly filled out, an acknowledgment of such notice of the following form: * * * But no person shall return to work therein until such repairs have been made and permission given." This provision of the statute, making it the duty of the miner to inform the mine boss of the defective condition of his room, is a material part of the statute. This duty imposed upon the servant is apart from that of the master to furnish props, etc., a duty that is not dependent upon the request of the employer.

It has been held that the violation of a rule of an employer by the employee, which violation contributed to his injury, is such negligence as will prevent the recovery of damages, although the employer may have

been negligent. *Lendberg v. Brotherton Iron Mining Co.* (1893), 97 Mich. 443, 56 N. W. 846; *O'Brien v. Staples Coal Co.* (1896), 165 Mass. 435, 43 N. E. 181; *Payne v. Chicago, etc., R. Co.* (1896), 136 Mo. 562, 38 S. W. 308.

The violation of a rule of the employer or of a statutory duty upon the part of a servant is contributory negligence of an aggravated character. Such violation of duty, however, to be available to defeat his recovery, must appear to have proximately caused or have contributed to the accident to which the injury in question is

imputed. *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, and cases cited; *Broschart v. Tuttle* (1890), 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Newcomb v. Boston Protective Department* (1888), 146 Mass. 596, 16 N. E. 555, 4 Am. St. 354; *Damon v. Inhabitants of Scituate* (1875), 119 Mass. 66, 20 Am. Rep. 315; *Monroe v. Hartford St. R. Co.* (1903), 76 Conn. 201, 56 Atl. 498.

The language of the statute is that when the miner "shall learn of such unsafe place," etc. Whether safe or not could

only be a matter of opinion until actual demonstration in some way had been made. Appellee's testimony and his admission show that in his opinion the roof was safe, for the time at least. To have given the instruction in question without qualification would have taken from the jury the question of what constitutes contributory negligence as measured by the rule of conduct of a man of ordinary prudence under like circumstances, and made it depend solely upon the fact that appellee remained in the mine after he believed the slate was bad, a relative, descriptive term, although in his opinion there was no immediate danger. He had ordered props. He had a right to expect them to be delivered, and the danger was not immediately threatening. As we read the opinion in the case of *Diamond Block Coal Co. v. Cuthbertson*, *supra*, the instruction cannot be approved. We quote from the opinion in the case of *Davis Coal Co. v. Pollard* (1902), 158 Ind. 607, 619: "If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, may be not; depending upon whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary pru-

dence, under all the circumstances. would take it, contributory negligence is not established.”

The second instruction, given at the request of the appellant, made no reference to the statute, but told the jury plainly that if appellee was informed of the defective and dangerous condition of the roof of his room the day before the accident, and continued to work the next day under said defective roof, when, because of said defective and dangerous condition, it fell and produced the injury of which he complains, he was guilty of contributory negligence and could not recover, although it might find that the appellant had violated its duty of visiting the mine and furnishing timbers for the support of the roof. Without passing upon the correctness of the instruction given, it is sufficient to say that appellant has no reason to complain of the refusal to give said ninth instruction, for in both instructions the continuance of appellee in his work, after knowledge of the defective condition of the roof, was made fatal to his recovery.

Judgment affirmed.

BOGGS v. BOGGS.

[No. 6,753. Filed February 23, 1910.]

1. **DIVORCE.—Alimony.—Amount of.**—The amount of alimony to be given in a divorce case is largely discretionary with the court. p. 398.
2. **DIVORCE.—Alimony.—Measure of.**—A wife who secures a divorce should be granted alimony sufficient to place her in as good a financial position as she occupied during marriage. p. 399.
3. **DIVORCE.—Alimony.—Evidence.**—Alimony in the sum of \$3,000. given to a wife who is granted a divorce because of her husband's cruelty, the evidence showing that he owned land valued at \$6,425, and a life estate in other land having an annual rental value of \$1,272, is not excessive. p. 399.
4. **DIVORCE.—Allowances to Wife for Expenses.**—A wife who has sufficient property should not be granted a temporary allowance *pendente lite*. but where a wife secures a divorce, or a husband's

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application is denied, the statute (§1080 Burns 1908, §1042 R. S. 1881) requires an allowance covering the expenses of the wife; and the sum of \$200 is not excessive in a contested case, where the husband's property is valued at more than \$6,000. p. 400.

5. *DIVORCE.—Alimony.—Instalments.—Stay.—Motion to Modify Judgment.—Appeal.*—A judgment for alimony made payable in instalments conditioned upon defendant's staying the judgment is not bad, the presumption being that the stay was to be given as required by statute (§§732, 733 Burns 1908, §§690, 691 R. S. 1881); and no question can be raised, on appeal, as to the form of judgment, there being no motion to modify. p. 400.

From Howard Circuit Court; *J. F. Elliott*, Judge.

Suit by Squire Boggs against Fannie Boggs. From a decree for defendant, plaintiff appeals. *Affirmed.*

John W. Strawn, Joseph C. Herron and Blacklidge & Wolf, for appellant.

James V. Kent and Bell & Purdum, for appellee.

HADLEY, J.—Appellant sued appellee for divorce. Appellee answered by general denial, and also filed a cross-complaint praying for divorce and alimony. Upon issues joined the court rendered judgment against appellant and for appellee upon her cross-complaint, granting her a divorce and \$3,000 in alimony, and also decreed that appellant should pay \$200 to the clerk of the court for the use of appellee in paying the expenses of her defense in said cause.

It is first urged against the judgment that the amount of alimony awarded to appellee is too large. It is well established that the amount of alimony to be awarded in

1. divorce proceedings is in the sound discretion of the trial court, and the appellate tribunal will not review that decision unless an abuse of such discretion has been shown. *Hedrick v. Hedrick* (1867), 28 Ind. 291; *Gussman v. Gussman* (1895), 140 Ind. 433; *Yost v. Yost* (1895), 141 Ind. 584; *Powell v. Powell* (1876), 53 Ind. 513; *Conn v. Conn* (1877), 57 Ind. 323; *Simons v. Simons* (1886), 107 Ind. 197; *Henderson v. Henderson* (1887), 110 Ind. 316.

There are no well-established rules for measuring the amount of alimony to be awarded, such amount always depending upon the facts and circumstances in each

2. particular case. It has been held that alimony, when given to an innocent and injured wife, should be in ^a proportion to leave her at least as well off pecuniarily in non-cohabitation as she would be in cohabitation. *DeRuiter v. DeRuiter* (1901), 28 Ind. App. 9, 91 Am. St. 107; *Yost v. Yost*, *supra*; *Gussman v. Gussman*, *supra*.

The evidence shows that appellant owned real estate worth \$6,425; that in addition he had a life estate in 318 acres of land, worth an annual rental of \$1,272; that

3. appellant, at the time of the trial, was forty-nine years of age and had an expectancy of twenty-one and eighty-one one-hundredths years. The evidence of appellant was very derogatory to the character of appellee. It was, however, wholly uncorroborated by any outside evidence, and, if untrue, was of a very malignant character.

The evidence of appellee shows that appellant was a very coarse and brutal man. This evidence was corroborated by disinterested witnesses. If the testimony of appellant was believed, appellant should have been given the divorce. If the testimony of appellant was untrue and the testimony of appellee was to be believed, appellee was properly granted a divorce, and, under such circumstances, the amount of alimony is not of such an exorbitant character as to compel us to say that the court abused its discretion in allowing it. The parties were before the trial court. It had opportunities for determining the truth or falsity of the various statements which are not given to us. It is evident from the finding that the trial court believed the evidence adduced by appellee and disbelieved the testimony of appellant. This being true, we see no just grounds for holding that the amount of alimony is excessive.

It is also urged that the court erred in allowing \$200 to

appellee for expenses of her defense. This allowance is specifically authorized by statute. §1080 Burns 1908, 4. §1042 R. S. 1881. This statute contains two separate and distinct propositions. One for a temporary allowance *pendente lite*, which should be refused if the wife has sufficient means to make her defense. *Kenemer v. Kenemer* (1866), 26 Ind. 330. The other makes it the imperative duty of the court, upon granting a divorce to the wife or refusing one upon application of the husband, to make an allowance sufficient to cover all reasonable expenses of the wife in prosecuting or making defense to the action. *Harrell v. Harrell* (1872), 39 Ind. 185; *Hilker v. Hilker* (1899), 153 Ind. 425. In each case the amount to be allowed is within the sound discretion of the court, and in this particular case no abuse of discretion is shown.

It is also urged that the court erred in the form of the judgment entered for alimony. The judgment was for \$3,000, payable in three instalments of \$1,000 each,

5. due respectively in three, fifteen and twenty-seven months after the date of the judgment, on the giving of sufficient surety for the payment thereof. The judgment then proceeds as follows: "And be it further ordered and adjudged that if said judgment is not stayed or security given for the payment thereof within thirty days from the date of said judgment, as required by law, then the whole amount of such alimony shall become due and payable, the same as if no such instalments had been mentioned in this decree." It is insisted that the case should be reversed as to the form of this judgment, since the judgment does not name the kind or character of security, nor by whom it is to be approved, and it is urged that the judgment is defective for this reason; citing *Rourke v. Rourke* (1856), 8 Ind. 427. It is, however, urged by appellee that this court cannot consider this question, for the reason that no objection was made to the form of judgment, no motion made to

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modify it, and no exception thereto was saved by appellant in the court below. It is well settled that the form of a judgment cannot be assailed in this court unless objection was made thereto in some proper manner in the court below. *Walter v. Walter* (1889), 117 Ind. 247; *Evans v. State* (1898), 150 Ind. 651; *Tucker v. Hiatt* (1898), 151 Ind. 332, 44 L. R. A. 129; *Allen v. Studebaker Bros. Mfg. Co.* (1899), 152 Ind. 406; *Gullett v. Phillips* (1899), 153 Ind. 227; *Fralich v. Barlow* (1900), 25 Ind. App. 383; *Felt v. East Chicago, etc., Co.* (1901), 27 Ind. App. 494; *Duzan v. Myers* (1903), 30 Ind. App. 227, 96 Am. St. 341; *Kelley v. Houts* (1903), 30 Ind. App. 474.

Furthermore, the language of the decree is that "if said judgment is not stayed or security given for the payment thereof within thirty days from the date of said judgment, as required by law," etc. Sections 732, 733 Burns 1908, §§690, 691 R. S. 1881, provide how bail or stay of execution may be taken, prescribe the class of sureties and who shall approve them. The language of the decree given clearly implies that the stay shall be taken in accordance with said sections. There is no available error in the record. Judgment affirmed.

CINCINNATI, LAWRENCEBURG AND AURORA ELECTRIC STREET RAILWAY COMPANY v. COOK.

[No. 6905. Filed February 24, 1910.]

1. **RAILROADS.—Interurban.—Negligence.—Highway Crossings.—Complaint.**—A complaint by a husband alleging that his wife was driving along the highway, that defendant interurban railroad company's motorman sounded his whistle, frightening one of the horses, that the team ran near the track and that such motorman, seeing the condition of the team, negligently ran his car against the wagon, to the injury of plaintiff's wife, and to his damage, states a cause of action. p. 404.

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2. RAILROADS.—*Interurban.—Complaint.—Allegations.—Recitals.*—Allegations that “when said horse became frightened and unmanageable, it was in plain view of the defendant’s motorman,” and that “such condition existed a sufficient time for defendant’s motorman to check the speed of the car and stop it, before striking said horses and wagon,” are direct averments of issuable facts. p. 404.
3. EVIDENCE.—*Character of Household.—Injuries to Wife.—Husband’s Damages.—Railroads.*—In an action for damages, by a husband, for injuries to his wife, evidence that, in addition to his own family, he employed at times four farm hands, is admissible as showing the value of her services. p. 405.
4. EVIDENCE.—*Injured Condition of Wife on Night of Injury.—Railroads.*—Evidence of the condition of his wife on the night of the accident is admissible in an action for damages by the husband against an interurban railroad company for injuries to such wife. p. 405.
5. DAMAGES.—*Suffering of Wife.—Husband’s Recovery for.*—A husband cannot recover damages for the pain and suffering of his wife. p. 406.
6. EVIDENCE.—*Condition of Railroad and Wagon Tracks.—Opinions as to Happening of Accident.*—Evidence of the appearance of vehicle tracks along a railroad track is admissible; but opinions as to how the accident occurred are improper. p. 406.
7. EVIDENCE.—*Extent of Injuries.—Partly Incompetent Answers.—Motions to Strike Out.*—Where a physician in answer to a question as to the extent of the injuries to plaintiff’s wife said that the prognosis for getting well was bad, that the condition might go on, and that she might become insane or epileptic, or develop abscesses on the brain, a motion to strike out the entire answer should be overruled, the incompetent parts, even if improperly retained, not constituting reversible error. p. 407.
8. RAILROADS.—*Unruly Horses.—Husband Entrusting to Son.—Contributory Negligence.—Jury.*—Whether a farmer was guilty of contributory negligence in entrusting his wife and son to drive a team containing one unruly horse along a highway, knowing that interurban cars would pass thereover, is a question for the jury. p. 408.
9. NEGLIGENCE.—*Driving Unruly Team on Highway Where Interurban Cars Pass.*—The driving of an unruly team along a highway, knowing that interurban cars pass thereover, does not constitute negligence. p. 408.

From Ohio Circuit Court; *George E. Downey*, Judge.

Action by Andrew T. Cook against the Cincinnati, Lawrenceburg and Aurora Electric Street Railway Company.

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From a judgment on a verdict for plaintiff for \$2,700, defendant appeals. *Affirmed.*

Stanley Shaffer, Frank B. Shutts and Martin J. Givan, for appellant.

Thomas S. Cravens and Wymond J. Beckett, for appellee.

RABB, P. J.—This was an action by appellee to recover damages for personal injuries alleged to have been sustained by his wife, and to have been proximately caused by the negligence of the appellant. Appellant's demurrer to the complaint was overruled, the case put at issue, a jury trial had, resulting in a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict.

A reversal is claimed on account of alleged errors of the court below in overruling appellant's demurrer to the complaint, and in the admission and rejection of certain items of evidence.

The averments of the complaint essential to present the question raised by appellant's demurrer are as follows: "That appellant operates an electric street railway between the cities of Aurora and Lawrenceburg; that its line of road runs along and over a public highway; that appellant's wife was driving along said highway from Aurora to her home, at a point on said highway between the two cities; that she was traveling in a wagon drawn by two horses, driven by her son; that, while she was so traveling along said highway, one of appellant's traction cars approached her at a high rate of speed from the rear; that the motorman in charge of the car, on approaching said team and wagon, sounded the whistle attached to the car, and thereby caused one of the horses drawing said wagon to become frightened and rear and plunge and run upon the track of the railroad; that appellant's servant operating said car could plainly see the frightened and unmanageable condition of said horse; that, when said team and wagon were so close to appellant's

track that said car could not pass without striking it, and when said motorman could see and know that he could not pass the wagon and team without striking it, and when he could, by the exercise of ordinary care, have stopped the car and avoided a collision, nevertheless he negligently ran his car against said wagon and team, and caused the injury complained of."

There are other averments in the complaint undertaking to charge appellant with negligence in sounding the whistle and running its car at a high rate of speed. These

1. averments are introductory and incidental. The gravamen of the complaint does not lie in the averment that appellant ran its car at a high rate of speed, or that its motorman negligently sounded its whistle on approaching the team, but in the fact that, after appellant's motorman knew that the team drawing the vehicle in which appellee's wife was riding was frightened and unmanageable, and had on that account brought said wife into a position of peril from the approaching car, said motorman negligently continued to approach with his car, when he could, by the exercise of ordinary care, have stopped it in time to avoid the collision and injury, and that he failed to do so, and ran into the wagon and team and caused the injury.

The criticism urged against the substantive averments of the complaint is that they are mere conclusions of the pleader, and not direct averments of issuable facts.

2. We are not able to agree with appellant's contention that the averment in the complaint, that "when said horse became frightened and unmanageable it was in plain view of the defendant's motorman," does not state clearly an issuable fact, as does also the averment that "such condition existed a sufficient time for defendant's motorman to check the speed of the car and stop it before striking said horses and wagon." It is said, in argument, that no

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facts are averred from which the court could say that defendant's motorman could have stopped the car, etc. The ultimate issuable fact was whether the motorman could have stopped the car, etc. That was one of the essential facts to be established by appellee to make out his case. Facts tending to show that this could have been done would be merely evidentiary, and improper to appear in the pleading. We think the facts averred in the complaint state a good cause of action, and this view is well supported by the cases of *Indiana Springs Co. v. Brown* (1905), 165 Ind. 465, 1 L. R. A. (N. S.) 238, and cases cited; *McIntyre v. Orner* (1906), 166 Ind. 57, 4 L. R. A. (N. S.) 1030, 117 Am. St. 359.

The court, over appellant's objection, permitted appellee to testify that, in addition to other members of his family,

he employed at times four farm hands, who lived in his

3. home and boarded with him. It is insisted that this evidence was not within the issues. This contention cannot prevail. Appellee's complaint proceeds upon the theory that his wife had the management and control of his household affairs, and that he has been damaged by reason of her disability properly to discharge her duties in that respect, and any evidence tending to illustrate the state and condition of appellee's family or household, which would be affected by the disability of its head and manager, would be competent.

Appellee was asked by his counsel to describe his wife's condition the night of the accident. The objection urged against the question was that the evidence sought to

4. be elicited would not tend to prove or disprove the loss of services. One of the essential facts of appellee's case was that his wife received bodily injury from the accident described in the complaint, which impaired her ability to discharge her duties as appellee's wife. Any evidence tending to establish this fact was clearly within the issues. Her physical condition immediately after the acci-

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dent happened would certainly tend either to establish or overthrow appellee's contention with reference to this particular point. The witness, in answer to the question, testified to expressions of pain made by his wife at the time.

The question did not necessarily call for such expressions,

and appellant is correct in its contention that the

5. jury have no right to allow the husband damages for his wife's physical or mental suffering. It does not, however, follow that the fact of such suffering may not be shown in evidence, in a suit by the husband to recover for the loss of his wife's services, occasioned by the injury. The physical or mental pain and suffering of the wife may itself affect her ability to perform her wifely duties.

One of appellant's witnesses testified to the appearance and condition of the ground at the scene of the accident,

and described certain tracks made by the team and

6. wagon approaching the railroad track. After having described the tracks made by the wagon, and their proximity to the tracks of the appellant's line of railway, the witness was asked this question: "And from the appearance there of the tracks, leading in to the street railway track, what would that indicate to you, as to how the horses got on the street railway track?" Appellee's objection to this question was sustained, and this ruling is insisted upon as error, and 3 Wigmore, Evidence, §1924, and *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642, are cited as authorities to sustain appellant's contention that the witness should have been permitted to answer the question. The facts which the testimony of the witness had reference to were the relation of the wagon tracks to the railroad tracks at the point where the accident happened. The testimony of the witness and of other witnesses could clearly and accurately present to the jury just how the wagon tracks approached the railroad track, so that the jury would be in as good a position to know what these appear-

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ances indicated as would the witness. The facts in this case, to which the witness was testifying, are entirely without the rule laid down in the authorities cited, and no error intervened in sustaining the objection to the question.

During the trial, Doctor Walter, a physician who had treated the appellee's wife for the injuries sustained on account of the accident, after having given his tes-

7. timony with reference to the lady's condition, and his treatment of her, was asked this question: "What *is your* opinion, Doctor, as to whether Mrs. Cook will get better or worse in the future; what is your prognosis of her condition?" "The prognosis for getting well is bad. The condition may go in. She may become insane or become an epileptic, or may later develop abscesses on the brain." Appellant made no objection to the question, but moved to strike out the answer, on the ground that it was not responsive to the question, and that it does not state a probable future condition, but a mere speculative opinion. The motion was to strike out the entire answer. The objection is that the answer refers not to a probable future condition, but a possible future condition. A part of the answer to this question was unobjectionable. Some part of it was amenable to the objection pointed out, but to make such objection effective to present any question to this court it should have been limited to those phrases of the answer to which it properly applies, and in the manner in which it was presented we think no question arises, and perhaps, if properly presented, and the ruling of the court thereon an error, such error would not afford grounds for a reversal. *Louisville, etc., R. Co. v. Lucas* (1889), 119 Ind. 583, 6 L. R. A. 193; *Muncie Pulp Co. v. Hacker* (1906), 37 Ind. App. 194.

It is insisted that the evidence affirmatively shows that the appellee was guilty of contributory negligence proximately causing the injury to his wife, complained of, in that he knew

that one of the horses attached to the wagon would
8. become frightened at street-cars, and that knowing this fact he entrusted the driving of the team along the road, where he knew the car would pass, to his minor son, nineteen years old. The question of negligence is peculiarly a question for the jury, and it does not follow that one making use of a public highway, where he knows that he will encounter some danger, is guilty of negligence in doing so. The question is, Would a person of ordinary prudence have acted, under the circumstances, as did the appellant? For anything appearing to the contrary, the young son, nineteen years of age, was more capable of managing the team than his father, and the court cannot say that his entrusting the driving of the team to the son, even though one of the horses was liable to become frightened, was an act of negligence, nor can it be said that one is guilty
9. of negligence in driving along a public highway, near a railroad, because he knows that his team is liable to become frightened at the cars. We have carefully examined all the questions presented by the record in this case, and find no reversible error.

Judgment of the court below affirmed.

S. BASH & CO. v. SIBLE ET AL.

[No. 6,627. Filed February 24, 1910.]

CONTRACTS.—Statute of Frauds.—Part Payment.—Partial Delivery—Evidence.—Where the evidence shows that the defendant company contracted orally for a quantity of onions for the price of over \$50, and a part of the onions were delivered, the remainder being sacked at the company's request, and a payment made upon them, a verdict for the plaintiffs for the remainder due is supported, such contract being taken out of the statute of frauds by such partial delivery and partial payment (§7469 Burns 1908, §4910 R. S. 1881).

From Allen Circuit Court; *E. O'Rourke*, Judge.

S. Bash & Co. v. Sible—45 Ind. App. 408.

Action by William B. Sible and another against S. Bash & Co. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

Barrett & Morris, for appellant.

Robinson & Luecke, for appellees.

WATSON, J.—The complaint was in two paragraphs. The first averred that appellees, on November 19, 1906, were the joint owners of red and yellow onions stored in separate and distinct lots in the barn of Fisher C. West, Hometown, Indiana; that appellant was a corporation, and George Warcup was its duly authorized agent for the purchase of onions; that acting as such agent he purchased the onions, after an inspection thereof, for the sum of \$454.36, which he agreed to pay to appellees on or before December 3, 1906, that on November 19, 1906, appellees delivered the onions to appellant; that appellant then and there received and accepted the onions under the foregoing contract; that the onions so purchased by and received into the possession of appellant were to be removed from said barn not later than December 3, 1906; that appellees agreed to hold the goods as bailees until December 3, 1906, appellant agreeing to take the onions away as rapidly as convenient; that, in consideration of the purchase, appellees agreed with appellant, on notice, to haul the onions without extra charge to Stoner Station; that on November 28 and 29, 1906, at the request of appellant, appellees hauled to said station 554 bushels of red onions, and to Hometown 129 bushels of yellow onions, being a portion of the onions so sold; that appellees on November 30, at the special instance and request of appellant, placed in sacks in said barn all the red onions then remaining, and on November 29, 1906, appellant paid to appellees \$202.32, as part payment for the onions so purchased; that appellees were ready and willing to haul the onions, but that no request was made for them to do so, no notice was given to them nor were any directions re-

ceived by them; that appellees performed all the conditions of the contract to be performed by them, but that appellant failed and refused to remove the remaining onions from the barn, by reason of which they became worthless. The second paragraph of the complaint contains substantially the same averments as the first, with the additional averment of the price per bushel to be paid for the onions.

The cause was put at issue, trial had by the court, and finding and judgment given in favor of appellees for the sum of \$297. The cause was appealed to this court, and the errors assigned are: (1) That the decision is not sustained by sufficient evidence, and (2) that the decision is contrary to law.

Appellees contend that at the time appellant's agent made the contract for the onions there was such a delivery as took the contract out of the statute of frauds. On the contrary, appellant contends that the delivery was not such as would bind it. Whether, under all the circumstances, considering the character of the property, the nature of the transaction, the relations of the parties one to another, and their relations with reference to the sale, there was such a delivery as would take this case out of the statute of frauds, it is unnecessary for us to determine this action. Section 7469 Burns 1908, §4910 R. S. 1881, is as follows: "No contract for the sale of any goods, for the price of \$50 or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

It is averred in the complaint and shown by the record that part of these onions, in fact, most of them, had been delivered to and received by appellant, and that it had made part payment therefor in the sum of \$202.32; that the

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onions then remaining undelivered were sacked at the instance and request of appellant, prior to December 3, 1906, but no notice or request to appellees was made for the hauling of such onions to the station.

The judgment of the court below is not contrary to the evidence, but is fully sustained thereby; nor is the judgment contrary to law.

Judgment affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES v. STOUGH.

[No. 6,819. Filed November 5, 1909. Rehearing denied January 26, 1910. Transfer denied February 24, 1910.]

1. **INSURANCE.—Beneficiaries.—Vested Rights.**—A policy giving to the assured the right to change his beneficiary does not give such beneficiary a vested right. p. 414.
2. **INSURANCE.—Policies.—Mutual Abrogation.**—A policy giving no vested right to the beneficiary may be abrogated by the mutual consent of assured and the company. p. 414.
3. **INSURANCE.—Contract.—Policy.—Notes.**—The policy and the premium notes constitute the contract between the company and assured. p. 414.
4. **INSURANCE.—Policy.—Cancellation.**—Where assured delivered up his policy to the company's local agent and obtained his premium note, his policy ceases to be binding, although the company, at its home office, without knowledge of the facts, has issued a short rate premium for the time the policy was outstanding. p. 415.
5. **INSURANCE.—Policy.—Notes.—Estoppel.**—Where a policy is surrendered and the premium note canceled no action can be supported on the policy, and the company is estopped to maintain an action on the note. p. 415.

From Marion Circuit Court (15,192); *Henry Clay Allen*, Judge.

Action by Matilda Stough against the Equitable Life Assurance Society of the United States. From a judgment for plaintiff, defendant appeals. *Reversed*.

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John B. Elam, James W. Fesler and Harvey J. Elam,
for appellant.

M. M. Bachelder, for appellee.

COMSTOCK, J.—Appellee sued appellant on an insurance policy issued on the life of William E. Stough, in which appellee, his mother, was named as beneficiary. Issues were formed on the one paragraph of complaint by general denial. Trial was had by jury, verdict returned in favor of appellee for \$——, and over appellant's motion for a new trial judgment was rendered thereon.

The action of the court in overruling the motion for a new trial is the only error assigned. As grounds therefor it is claimed that the verdict is not sustained by sufficient evidence, is contrary to law, and that the court erred in giving and in refusing to give to the jury certain instructions.

The following facts, as shown by the evidence, are contradicted. Louis B. Noble, a local agent for Elkhart county, Indiana, of the Equitable Life Assurance Society, working under the direction of William B. Paul, in May, 1904, sold a policy of life insurance to William E. Stough. The premium for said policy was \$31.31, and was paid at the time of the delivery of the policy, on or about May 14, 1904, \$6.31 in cash and a note given to and payable to said Noble for balance of \$25, payable sixty days after date, May 10, 1904. Said policy was issued by said company and sent to William B. Paul, its general agent, and by Paul was sent to Noble and by Noble delivered to Stough. Paul was connected with the company from June, 1904, to the latter part of the year 1905. Noble wrote business for the company. His contract was with William B. Paul, and was in force May 12, 1904. Paul paid the company all that it was entitled to of the premium from said Stough on said policy. Stough made no other payment than the \$6.31 on said policy. After the death of the insured, Paul received from the company \$7 or \$8. The company retained a medical fee of \$5.

and a term rate on the policy up to the time it was canceled. Noble kept the note during the sixty-day limit allowed for the return of the policy, and after several attempts to collect it told Stough that he had to return the policy before the sixty-day limit was out, which would be about the middle of July. Stough said that he could not make the payment, that he had been disappointed in some help that he had expected, and that he would have to give up the policy. It was agreed between Noble and Stough that the said sum of \$6.31 should be kept by Noble as reimbursement for medical fees and other expenses. Stough gave the policy to Noble at least two or three days before the time was out for him to return it. Noble delivered the note to Stough the same day the policy was returned. When the policy was returned to Noble, he wrote across the face of the note, words to this effect: "This note is returned because the policy was not taken out." On August 15, Stough became sick with small-pox, and died after an illness of five days. At the time of his death the note was in the possession of Stough, and across the face of it was written: "This note was given for life insurance which was returned, N. T. O. Therefore the note was returned." The letters "N. T. O." meant not taken out.

In addition to the foregoing undisputed facts, there was evidence, not wholly without contradiction, that Paul paid the company \$15.65 which he received from Noble about August 1, 1905; that he paid for this policy about July 19, 1904, and charged it to Noble's account, and he told Noble that this Stough policy must be paid for or returned; that afterwards, in August, 1904, he received the policy in a letter from Noble. Paul testified that he had mislaid the letter; that it was his opinion that the letter stated that Stough was dead or about to die, and the policy had better be canceled; that he forwarded the policy to William T. Tasker, cashier of appellant society for the State of Indiana, and received from the company \$7 or \$8. There is evidence that the

policy was not received at the home office until after the death of the insured. Noble testified that he mailed the policy to Paul the day after he received it.

The complaint alleges that at the time of the death of decedent the policy was in force and in his possession, and that at about that time the defendant, unlawfully, wrongfully and without the knowledge or consent of the decedent, took the policy from his possession and deprived him of the use thereof.

There is no evidence in support of these allegations. The question is not whether the local agent had authority to cancel the policy. The insured had the right, under

1. the terms of the policy, to change the beneficiary.

The beneficiary therefore had no vested right. *Denver Life Ins. Co. v. Crane* (1903), 19 Colo. App. 191, 73 Pac. 875; *Milne v. Northwestern Life Assur. Co.* (1898), 23 Misc. (N. Y.) 553, 52 N. Y. Supp. 766. The insured had complete control of the policy.

A policy may be surrendered by mutual agreement so as to terminate the rights and obligations of the parties. *Ohio Farmers Ins. Co. v. Hunter* (1906), 38 Ind. App. 11;

2. *Mutual Life Ins. Co. v. Phinney* (1900), 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; *Mutual Life Ins. Co. v. Sears* (1900), 178 U. S. 345, 20 Sup. Ct. 912, 44 L. Ed. 1096; *Mutual Life Ins. Co. v. Hill* (1900), 178 U. S. 347, 20 Sup. Ct. 914, 44 L. Ed. 1097; *Mutual Life Ins. Co. v. Allen* (1900), 178 U. S. 351, 20 Sup. Ct. 913, 44 L. Ed. 1098; *Mosser v. Knights Templars, etc., Co.* (1898), 115 Mich. 672, 74 N. W. 230; *Van Wert v. St. Paul Fire Ins. Co.* (1896), 8 App. Div. 107, 40 N. Y. Supp. 463.

The evidence shows, without contradiction, that Stough voluntarily rescinded his contract of insurance and surrendered his policy. This he had the right and was

3. competent to do. The policy of insurance and the premium note given therefor constituted the contract between the insurance company and the insured. They had

the same power to rescind it by mutual agreement as they had to make it. *Akers v. Hile* (1880), 94 Pa. St. 394, 39 Am. Rep. 792; *German Ins. Co. v. Davis* (1889), (Ark.), 12

S. W. 155. The fact, that the company at the home

4. office at New York charged the general agent, under whom the policy was issued, a short rate premium for the time the policy was outstanding, without knowledge of all the facts, would not change the situation in any respect. It cannot successfully be contended that, after the note was surrendered and canceled, and the insured had delivered the policy to the agent from whom he obtained it, Stough could have been successfully sued upon the note. And, by

5. parity of reasoning, the representative of the insured would be estopped to deny that he intended to do just what he did, and that he dealt with the agent as one having full authority, and that he fully intended to surrender his policy. The verdict is not sustained by the evidence. Other alleged errors need not be considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

HOLTZ ET AL. v. GAIDRY.

[No. 6,584. Filed April 1, 1909. Rehearing denied June 8, 1909. Transfer denied February 24, 1910.]

1. **CONTRACTS.—Sales.—Acceptance.—Fraud.**—A contract requiring the vendor to furnish to the purchaser machinery of a certain kind "to the acceptance of" such purchaser, ordinarily makes the decision of such purchaser final, except in case of fraud. p. 416.
2. **APPEAL.—Parties.**—Where the record is uncertain and the verdict and judgment were against one defendant alone, another defendant who was made a party to the case at his own request, will not be considered as a party to the appeal. p. 418.
3. **APPEAL.—Affirmance.—Death of Party.**—Where an appellant dies before the judgment appealed from is affirmed, it will be affirmed as of the date of submission. p. 419.

From Warrick Circuit Court; *Roscoe Kiper*, Judge.

Holtz v. Gaidry—45 Ind. App. 415.

Action by J. Wilfred Gaidry against Ferdinand Holtz and another. From a judgment for plaintiff, defendants appeal. *Affirmed.*

DeWitt Q. Chappell and *Henry F. Fulling*, for appellants.

J. E. Williamson and *Hatfields & Hemenway*, for appellee.

ROBY, J.—Action by appellee against appellant Holtz to recover money under a contract as follows:

“Whereas, C. F. Breidenbach has sold and promised to deliver on a hull of a steamboat to be built for J. Wilfred Gaidry, when said hull is ready to receive the same, the following engines and machinery, to wit: * * * The contract price for the machinery and boiler is \$1,050, which sum of money, to wit, \$1,050, has this day been deposited with F. Holtz, doing business as the Mechanics Foundry, in the city of Evansville, by J. Wilfred Gaidry. Now it is agreed that when the machinery, boiler, etc., have been delivered in the condition as herein set out and to the acceptance of said Gaidry, then said sum of money is to become and be the absolute property of said F. Holtz, and until said Gaidry shall have received and accepted said machinery and boiler said sum of \$1,050 is to be and remain the property of said Gaidry, and is to be returned to him, on demand, by said F. Holtz.

C. F. Breidenbach,
F. Holtz, Mechanics Foundry,
By Charles H. Thuman, Superintendent.
Dated at Evansville, Indiana, August 28, 1902.”

Gaidry refused to accept the machinery because of defective cylinders, which the United States government inspector would not permit to be used, and demanded the return of the money from Holtz.

The provision in the contract “to the acceptance of said Gaidry” constituted Gaidry the judge of his own satisfaction. His refusal to accept terminated the contract.

1. and until he “received and accepted,” the money in Holtz’s hands was Gaidry’s money. *Gray v. Central*

R. Co., etc. (1877), 11 Hun 70; note to *Church v. Shanklin* (1892), 17 L. R. A. 207; *McClure v. Briggs* (1886), 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *Goodrich v. Van Nortwick* (1867), 43 Ill. 445; *Zaleski v. Clark* (1876), 44 Conn. 218; *Brown v. Foster* (1873), 113 Mass. 136, 18 Am. Rep. 463. Such a contract may be unwise, but if a party deliberately enters into such an agreement he must abide by it. *McCarren v. McNulty* (1856), 7 Gray 139; *Heron v. Davis* (1859), 3 Bosw. 336; *Walter A. Wood, etc., Mach. Co. v. Smith* (1883), 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *Gray v. Central R. Co., etc., supra*. In the case of *McCarren v. McNulty, supra*, it was said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain, the law can afford him no relief. Having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provision." The rule prevails, unless the declaration of the prospective buyer, that he is not satisfied, is made in bad faith or fraudulently. *Lynn v. Baltimore, etc., R. Co.* (1883), 60 Md. 404; *Silsby Mfg. Co. v. Town of Chico* (1885), 24 Fed. 893; note to *Chism v. Schipper* (1889), 28 Cent. L. J. 160. Bad faith or fraud was not shown, and judgment was properly rendered against Holtz for the amount of the money deposited with him and interest thereon. The pleadings in this case are voluminous and involved. The record, exclusive of the bill of exceptions containing the evidence, contains 310 typewritten pages. The venue was several times changed, and the case was in turn before the Superior Court of Vanderburgh County, the Gibson Circuit Court, the Knox Circuit Court and the Warrick Circuit

Court. The litigation has extended over a period of more than six years. Forty errors are alleged to have been committed by the trial courts. The condition of the record precludes extended consideration of a multitude of unimportant questions which are mooted.

When the action was first instituted by Gaidry against Holtz for the recovery of the sum of money named, C. F.

Breidenbach became a party defendant on his own

2. motion, and Gaidry added a paragraph of complaint asking for damages against Breidenbach, who filed a counterclaim. Plaintiff filed an answer and Breidenbach replied. Holtz filed an answer, trial was had by jury, and a verdict was returned for the defendants, with answers to interrogatories. Motion for a new trial was sustained. On motion of the plaintiff the answers of Breidenbach were stricken out. Holtz and Breidenbach again pleaded, and the plaintiff filed an amended complaint. Holtz answered in general denial. Breidenbach then filed a counterclaim against plaintiff and a cross-complaint against Holtz. On motion of the plaintiff this counterclaim was ordered docketed as a separate cause. Later, after an unsuccessful attempt by Holtz and Breidenbach to reform the contract by cross-complaints to correct a mistake, motions of the plaintiff were sustained to strike out the pleadings of Breidenbach and to strike his name from the record. The record shows that subsequent to this time an answer to the cross-complaint of defendant Holtz was filed by Breidenbach. Some of the pleadings are entitled "Gaidry v. Holtz" and some are entitled "Gaidry v. Holtz and Breidenbach," but the judgment appealed from, rendered upon the verdict of the jury after it was instructed by the court, was rendered against Holtz alone. From the uncertain and inaccurate record we have determined that Breidenbach is not a party to this appeal. Numerous other pleadings were filed during the course of the trials, which are not necessary to be detailed.

Counsel have suggested the death of Ferdinand Holtz since

the submission of this cause, and pray that judgment

3. be rendered as of the time of the submission of the cause, without change of parties.

The judgment is affirmed as of the date of submission.

**SUPREME TENT, KNIGHTS OF THE MACCABEES OF
THE WORLD v. FISHER.**

[No. 6,675. Filed February 25, 1910.]

1. **INSURANCE.—Beneficial Associations.—Policies.—Performance of Conditions.—Complaint.**—A complaint setting out the policy issued to assured in favor of the plaintiff beneficiary, and alleging that defendant association refused to furnish blanks for making proofs of death, and refused to accept proofs of death, and that the assured and the beneficiary had performed all of the conditions on their parts, is sufficient. p. 422.
2. **INSURANCE.—Beneficial Associations.—Tender of Dues.—Refusal.—Complaint.**—A complaint alleging that the assured tendered to the authorized local secretary of defendant beneficial association "all moneys and assessments due" for a certain month, which he refused to accept, sufficiently shows a tender. p. 422.
3. **EVIDENCE.—Declarations of Assured After Suspension.—Insurance.**—Declarations by an assured, made after his suspension by a beneficial association for nonpayment of dues, that he had decided to drop the insurance and that after advising with his wife—the beneficiary—he decided not to carry it any further, are admissible, in an action by his beneficiary. p. 425.
4. **INSURANCE.—Beneficial Associations.—Dues.—Legal Enforcement of Payment of.**—A member of a beneficial association can not be compelled to pay his dues. p. 426.
5. **INSURANCE.—Beneficial Associations.—Nonpayment of Dues.—Change of Employment.**—Where a member of a beneficial order engages in an extra-hazardous employment and fails to pay his dues therefor, he is legally suspended, although there was a controversy over the matter between him and the local secretary; and the reasonableness of the by-law in reference to such extra hazard is not involved. p. 426.
6. **TENDER.—What Constitutes.**—To constitute a tender there must be a definite offer to pay, and an unqualified refusal to accept. p. 426.
7. **TENDER.—Waiver.—Ability to Perform.—Burden of Proof.**—The formal requisites of a tender may be waived, but the ability to perform must exist, the burden of proving such ability being upon the one pleading the tender. p. 427.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Lizzie Fisher against the Supreme Tent, Knights of the Maccabees of the World. From a judgment for plaintiff, defendant appeals. *Reversed*.

Warren Sayre, Nelson G. Hunter, C. K. Lucas and John V. Sees, for appellant.

Lyman H. Jackman and Clifford F. Jackman, for appellee.

COMSTOCK, J.—The complaint was in two paragraphs. The first alleged, in substance, that defendant was a mutual and fraternal beneficiary association, doing business under the laws of the State of Indiana; that on December 30, 1895, Lemuel A. Fisher was duly elected and admitted as a beneficiary member of defendant order, and continued as such beneficiary member until his death on December 29, 1905, and was at all times in good standing and entitled to all the benefits and privileges appertaining and incident to such membership; that said Fisher at all times performed all the duties incumbent upon him as such member, and otherwise complied with all the requirements thereof and performed all the conditions on his part to be performed; that at the time said Fisher was received as a member of said order, defendant executed and delivered to him a certificate, or policy of insurance, marked exhibit A; that said Fisher died in Huntington county, Indiana, on December 29, 1905; that on said date said certificate was in full force and effect, and that said Fisher had at all times theretofore been a member in good standing of said association; that plaintiff performed all the requirements on her part; that defendant denies liability under said certificate and refuses to furnish plaintiff with blanks for the purpose of making and executing proofs of death, and refuses to accept proofs of death of said Fisher; that plaintiff is the widow of Lemuel A. Fisher, and demands payment of said insurance, but defendant refuses payment.

The second paragraph contains the same allegations as to

appellant association, and the admission of said Fisher and the issuing of a certificate of membership, as set out in said first paragraph, and further alleges that from the date of his admission to November 1, 1905, Fisher was at all times in good standing; that on said November 1, 1905, and during the months of November and December, 1905, there was in full force and effect a certain by-law of defendant company, as follows:

“These monthly rates will be due without notice on the first day of each month, and must be paid by the member to the tent record keeper on or before the last day of the month.”

That during said months of November and December, 1905, John V. Sees was record keeper of the local tent of defendant; that on November 18, 1905, Fisher offered to pay and tendered to said Sees for said defendant all moneys and assessments due to defendant for the month of November, 1905; that Sees then and there refused to accept such money. Then follow the same allegations as to Fisher's death and demand of payment as are in the first paragraph. A separate demurrer for want of facts was overruled to each paragraph of complaint, and appellant answered in five paragraphs, to the third and fourth of which demurrers were sustained. Upon the issues formed by the first and second paragraphs of complaint, the first, second and fifth paragraphs of answer, and reply in denial, the case was submitted for trial to a jury, resulting in a verdict and judgment for \$1,000 in favor of appellee.

The assignment of errors challenges the correctness of the ruling of the court upon each of said demurrers and upon appellant's motion for a new trial.

The objection urged against the first paragraph of the complaint is based upon that part which is in the following language: “That said defendant denied liability under said certificate and policy of insurance, and refused and still refuses to furnish this plaintiff with blanks for the pur-

pose of making and executing proofs of death, and refuses to accept proofs of death of said Lemuel A. Fisher.”

It is insisted by appellant that the complaint shows upon its face that appellee has failed to comply with the laws of the order; that the death of Lemuel A. Fisher oc-

1. curred on December 29, 1905, and this suit was commenced on January 14, 1907, and all proofs of death were due before the commencement of this suit and were not filed; that the averments by which appellee attempts to avoid the effect of this laches are not sufficient; that the averment pleaded is not the averment of a fact, but a mere conclusion. Said paragraph, in addition to the foregoing, alleges “that the insured has at all times performed all the duties incumbent upon him as such member, and has otherwise complied with all the requirements thereof and performed all the conditions on his part to be performed,” and that the plaintiff has performed all the conditions on her part to be performed. These allegations are sufficient. §376 Burns 1908, §370 R. S. 1881; *Grand Lodge, etc., v. Barwe* (1906), 38 Ind. App. 308, and cases cited; *Firemen's Fund Ins. Co. v. Finkelstein* (1905), 164 Ind. 376.

The objection to the second paragraph of complaint is that it does not state the amount due at the date of the alleged tender, nor that the amount tendered was in lawful

2. money, and does not show that the amount tendered was brought into court for the use of defendant. The language with reference to the tender is as follows: “Plaintiff further says that on November 18, 1905, Lemuel A. Fisher offered to pay and tendered to said John V. Sees, as such authorized and acting record keeper of said defendant, all moneys and assessments due this defendant association for the month of November, 1905; that said John V. Sees, as such authorized and acting record keeper, did then and there refuse to accept such moneys and assessments from said Lemuel A. Fisher, although being authorized by said

defendant association as the record keeper for said local tent or lodge, and it being his duty to accept such payment.” The averment may be lacking in definiteness of statement as to the amount and character of money of the alleged tender, but this could have been remedied by a motion to make more specific. We have considered the averments of the third and fourth paragraphs of answer and the objections thereto. In these rulings we find no error, but, in view of the conclusion reached, we do not deem it necessary to discuss or further refer to them in this opinion.

One of the reasons set out in the motion for a new trial is that the evidence is insufficient to sustain the verdict.

It also appears that on June 26, 1904, and while the insured was engaged in a nonhazardous employment, defendant revised its by-laws; that said by-laws provided, among other things, as follows:

“§281. Brakemen on freight-trains shall not be admitted to the association. §282. Any member who engages in a prohibited occupation shall forfeit all rights as life benefit member, and his certificate shall thereby become absolutely null and void. * * * §347. A life benefit member failing to pay his monthly dues and assessments within the month on the first day of which they are due shall stand suspended, without notice, from all rights of life benefit membership. * * * §394. No benefit shall be paid on account of the death or disability of a member who is under suspension for any cause at the time of his death or disability.”

It is insisted on behalf of appellee, not that the assessments and dues for the month of November, 1905, were paid, but that the evidence shows an offer to pay and a refusal to accept—in other words, a tender of said assessments and dues—and that the conduct of appellant’s representative excused the insured from making actual tender. The only evidence on the subject of tender was given by the witness John V. Sees, who, during the months of November and December was, and ever since has been, record keeper for the

local tent of the defendant order at Huntington, Indiana. In reference to a conversation held with Fisher, the insured, on November 18, 1905, said witness testified: "I went into Hosler's barber shop here in the city to collect Hosler's dues, and Fisher was being shaved, * * * and as I went to go out he called to me and said: 'How about me?' or 'What are you going to do about me? You know I have gone into the railroad service?' And I said: 'No, I did not know it, but I know it now,' or something to that effect, and he said: 'What are you going to do about me?' and I answered him that I was sorry, but I believed under the by-laws that his policy was lapsed, and that I did not believe, under the by-laws, that I had the right to take his money, and that the by-laws were very strict on the record keepers' taking money from people in the railroad service, and explained to him what those by-laws were; that they provide for the expulsion of the record keeper if he did so, but that the final decision of the matter lay with the supreme record keeper of the order, and that, if he wished, I would take his money and send it, along with the rest of the money, and an explanation of his case to the supreme record keeper, and he said something to the effect that there was too much red tape about it to suit him, and he made the remark in a joking sort of way, but he meant it, too, and that he did not believe he would take any further steps in the matter. I told him that unless he paid me before the first of December I would suspend him, and he said if he was going to pay me, or rather, I think he said if he changed his mind he would pay me before that time or let me know about it." Said witness further testified as follows: "Q. Mr. Sees, at that time, in Hosler's barber shop, did he offer to pay you his dues? A. Not any more than the conversation there indicated. That is all that took place between us. Q. Now, Mr. Sees, I will ask you if he did not say to you at that time: 'Mr. Sees, how about it? Will you take my money?' And I will ask you, Mr. Sees, if you did not say to him, no, that you could

not take his money as record keeper, but you would take it as a forwarding agent. A. Well, that is in effect, Mr. Jackman, what was said, and still it was not exactly that. It was more as I stated to you before. Q. Would you take his money there or at any other time as record keeper? A. If he had offered it to me I do not believe that I would have taken it as record keeper, except to forward it to the supreme record keeper, as I stated. Q. Now, did he at no other time offer you any money, or offer to pay his dues? A. No. Q. Mr. Sees I will ask you if you did not tell me at one time in my office that Mr. Fisher had offered to pay his dues—his local dues to the Maccabees—and that you had refused to accept them except as a forwarding agent? A. Something to that effect, Mr. Jackman. I think I made you a somewhat similar statement to what I have made here, except in different language.”

On cross-examination said witness testified: “Q. Then he [Fisher] did not offer to pay the flat rate, nor, in addition to that, an extra hazard, did he? A. Well, now, he did not make any offer to pay the flat rate except inasmuch as the conversation that I stated before, that he asked me what would be done about his business.” The records of said local tent of said order show that the insured was suspended on December 1, 1905, for nonpayment of dues. A written notice of his suspension was sent to and received by the insured.

Subsequent to the conversation had on November 18, the record keeper had another conversation with Fisher on or about December 5, 1905, in which the insured stated.

3. in substance, that he had received said written notice of his suspension, and in which he said to Mr. Sees: “I was coming up to see you about that [insurance]. I have decided to drop it; so you do not need to pay any further attention to it.” He said that he had talked the matter over with his wife, and as he had some other insurance that he regarded just as good or better he had decided to let it go;

that the Maccabees insurance was only good until he was fifty-five years of age, and that he did not believe he would carry it any further. The statement made by the insured on December 5 is pertinent as showing his purpose, after full consideration, to drop this insurance, and as a further declaration upon his part to accept the offer of the tent recorder made with a view of his reinstatement. He clearly elected to accept the suspension as permanent. He was under no legal obligation to pay his assessment. No legal remedy was open to the association to enforce it. The life of the association is dependent upon the payment of assessments according to the provisions of its laws. *Union Mut. Life Ins. Co. v. Adler* (1906), 38 Ind. App. 530.

4. The reasonableness of §282, in reference to members' engaging in hazardous employment, is discussed. The consideration of that question is not necessary, because

5. the insured was suspended under the section which applies to the nonpayment of dues and assessments for the month of November. It is shown without contradiction that the assessment for the month of November, 1905, and which the insured had the entire month in which to pay, was not paid. It appears, too, without dispute that he was suspended on December 1, 1905, for failure to pay his dues; that he was notified in writing by the proper officer of said company of his suspension, and that after he had received such notice he conferred with his wife on the subject and decided, in view of the fact that he had other insurance which he regarded as good, if not better, to drop the insurance in question. The evidence shows neither payment nor tender of payment of the dues in question. To con-

6. stitute a tender there must be, on the one hand, a definite offer to pay and, on the other hand, an unqualified refusal to accept. *Shotwell's Executors v. Dennman* (1793), 1 N. J. L. *174; *Eastland v. Longshorn* (1818), 1 Nott. & McC. *194; *Pulsifer v. Shepard* (1864), 36 Ill.

513; *Selby v. Hurd* (1883), 51 Mich. 1, 16 N. W. 180; *King v. Finch* (1878), 60 Ind. 420.

While the formal requisites of tender may be waived, there can be no waiver of performance, unless there is an ability to perform. *Wynkoop v. Cowing* (1859), 21 Ill. 570, 7. 587; *Steele v. Biggs* (1859), 22 Ill. 643, 656; *Pinney v. Jorgenson* (1880), 27 Minn. 26, 6 N. W. 376; *Niederhauser v. Detroit, etc., St. R. Co.* (1902), 131 Mich. 550, 91 N. W. 1028; *Shank v. Groff* (1898), 45 W. Va. 543, 32 S. E. 248. Appellant's representative did not unqualifiedly refuse to accept the money, nor did appellee ever offer to pay; but even if the claim made by appellee is correct, to make a waiver effective it must appear that the insured had the money in his present or immediate control. Upon this there is no evidence. As to waiver of tender, the cases go no farther than to hold that a refusal in advance to accept, excuses further offer or effort to pay, but it must always be made to appear that the party making the tender has the capacity to do what he was obligated to do. That is one of the essentials of a good tender. Where a party offering to pay has had that offer refused, he is not entitled to treat it as a tender, unless he shows that he was ready and willing to do what he proposed. He can suffer no loss by having been deprived of an opportunity to do what he was in no condition to do. The burden of showing an ability to do a particular thing offered to be done is upon the party making the offer.

Judgment reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

WULSCHNER-STEWART MUSIC COMPANY v. HELFT.

[No. 6,963. Filed February 25, 1910.]

1. **WORK AND LABOR.—Money Advanced.—Complaint.—Bills of Particulars.**—In an action for commissions on sales, and for money expended, a complaint which shows neither by its averments nor by the bill of particulars thereto attached that the commission was earned, nor that such money was advanced by the plaintiff, is not sufficient, a general allegation of indebtedness being insufficient. p. 428.
2. **PLEADING.—Common Counts.—Code.**—The common counts, as established by the common law, are sufficient under the Indiana code, but a common count which fails to allege that the work sued for was done, or that the money sued for was advanced by the plaintiff, is bad. p. 429.
3. **APPEAL.—Defective Pleadings.—Evidence Not in Record.—Right Result.**—Where the pleadings alone are in the record, the Appellate Court is unable to tell whether a correct result was reached. p. 429.

From Superior Court of Vigo County; *John E. Cox*, Judge.

Action by Walter Helft against the Wulschner-Stewart Music Company. From a judgment for the plaintiff, defendant appeals. *Reversed.*

Crane & Miller and J. Harvey Caldwell, for appellant.

Frank S. Rawley, Isaac Torner and Frank W. Snider, for appellee.

ROBY, J.—Appellee's complaint is in one paragraph. Its averments are that defendant is a corporation; "that defendant is indebted to plaintiff for commission as a

1. salesman for defendant in the sum of \$500, which is now due and wholly unpaid; that defendant is indebted to plaintiff for wages and expense money advanced for and in behalf of said defendant, in the sum of \$75, which is now due and wholly unpaid." Upon motion the court

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required him to furnish a bill of particulars, which was done. Such bill is in form as follows:

“Walter Helft,

v.

Wulschner-Stewart Music Co.

Vose piano sold to Peter Denkleman, July 11, 1905,
Terre Haute, \$5.”

The item set out is one of fifty-six. There is nothing in the complaint or bill of particulars showing that the commission specified was earned or the wages and the expense money advanced by plaintiff. The bill of particulars, reference to which may be made to cure the defect in the body of the pleading, is ineffective for that purpose. The general allegation of indebtedness is insufficient to inform defendant of the nature of the claim against it. *Peden v. Mail* (1889), 118 Ind. 556; *Gise v. Cook* (1899), 152 Ind. 75; *Brickey v. Irwin* (1890), 122 Ind. 51.

It is contended that the complaint is sufficient as a common count. The sufficiency of the common count as a complaint is established by the decisions, although log-

2. ically not in accord with code provisions. *Southern R. Co. v. Hazlewood* (1909), *post*, 478. The absence of the averment that the work was done, or that the money was advanced by plaintiff, is as fatal at common law as under the statute. Stephen, Pleading. 378, 387.

The evidence is not in the record, and in its absence we are unable to say that the right result was reached.

3. The judgment is reversed and cause remanded, with instructions to sustain appellant's demurrer to the complaint.

FINLEY ET AL. v. CITY OF KENDALLVILLE.

[No. 6,619. Filed February 25, 1910.]

1. MUNICIPAL CORPORATIONS.—*Drains.—Discontinuance.—Surface-Waters.*—A drain constructed by a city for carrying off surface-waters may be discontinued by such city without liability, where property owners are left in no worse condition than they occupied prior to the construction of such drain. p. 432.
2. APPEAL.—*Harmless Error.—Exclusion of Evidence.—Directing Verdict.*—Where upon the undisputed facts the plaintiffs are not entitled to recover, alleged errors in excluding evidence and in directing a verdict for defendant will be considered harmless. p. 434.

From Lagrange Circuit Court; *James S. Dodge*, Judge.

Action by Frank S. Finley and another against the City of Kendallville. From a judgment for defendant, plaintiffs appeal. *Affirmed.*

Colerick & Ninde, for appellants.

R. P. Barr and *L. W. Welker*, for appellee.

MYERS, C. J.—Appellants brought this action against appellee to recover damages for injury to their certain real estate caused by surface-water. At the close of appellants' evidence, upon the court's direction, the jury returned a verdict in favor of appellee, and judgment thereon was rendered against appellants. Appellants' motion for a new trial was overruled, and this ruling is the only error assigned. Appellants, in support of their motion for a new trial, have assigned twenty-one reasons, sixteen of which relate to alleged errors of the court in refusing to admit in evidence certain proceedings of the common council of Kendallville, and in refusing to permit a certain witness to give his opinion as to the rental value of appellants' property prior to a certain date and after that date. The seventeenth reason challenges the action of the court in directing a verdict for the appellee. The last four reasons relate to the assignments

that the evidence does not support the verdict, and that the verdict is contrary to law. •

The facts, about which there is practically no dispute, show that the property in question is situated at the southwest corner of East and Richmond streets in the city of Kendallville; that appellants became the owners of this property in 1887, and have since resided thereon; that the dwelling faces East street, from which street Richmond street extends westward; that Richmond street, with the lots adjoining it, a short distance west of East street is low and subject to overflow by surface-water in wet seasons; that the rear or western portion of appellants' lot is five and one-half or six feet lower than the front portion, on which is located the dwelling-house; that in 1878, and prior thereto, a portion of Richmond street adjoining appellants' property, as well as the neighboring lots, was subject to overflow in wet seasons, and for lack of an outlet the water remained in the street and on portions of the adjoining lots for a considerable time; that in 1878 the city council caused to be constructed a drain, commencing at the lowest point in Richmond street, about one hundred and fifty feet from the residence of appellants, thence extending northeastwardly along that street to East street, thence north along East street to the right of way of the Lake Shore and Michigan Southern railway, thence east along said way; that this drain was constructed in part out of four- or five-inch farm tile laid beneath the surface of the ground, and in part was an open ditch; that its only use was to carry off the surface-water from the low portion of Richmond street and the adjoining grounds, including the premises of appellants; that no adjoining proprietor tapped it or connected his premises with it; that it had an open inlet through a sunken box in Richmond street; that in 1892 the railroad company filled up that portion of its right of way on which the drain was located, and constructed a track thereon; that thereafter one Moyer, residing on the south side of the railroad right of way, complained to ap-

appellee regarding the outlet of the ditch, and claimed that the water from it was overflowing his premises, whereupon the city council of Kendallville declared said drain a nuisance, and caused its inlet to be filled with sod and earth; that afterward said council rescinded its action, declaring the drain to be a nuisance, and attempted to open it, but it thereafter appeared to be partially obstructed; that said drain was abandoned by the city and its inlet was filled up in 1896, and thereafter, until appellants filled up the rear portion of their lot in the year 1903, the surface-water was not carried away by the drain, and after excessive rains the water would collect and overflow the rear end of appellants' lot, injuring the trees and shrubbery thereon, overflowing the cistern and flooding the cellar, causing the cellar wall to crack, thereby damaging and injuring appellants' property, and it is for such injuries that this action was brought.

It appears that after the year 1896, at some time not mentioned in the evidence or set forth in the briefs, appellee caused a two-inch iron pipe to be sunk into the gravel near the point which had been the entrance to the drain in Richmond street, for the purpose of allowing the accumulated water to sink. It also appears that in 1892 one of the appellants signed a remonstrance against the construction by the city of a sewer in Richmond street. In 1901 a petition was presented to the council for the grading of Richmond street, and some time before the trial it had been graded and the place where the drain had started was filled up and leveled. The water which invaded the premises of the appellants was surface-water, not by the city gathered into a body or collected into a channel and discharged upon said premises.

It was water against which the appellee was not, in the first instance, under any obligation to protect the appellants

or their vendor. As we have seen, the railroad com-

1. pany, in the legitimate use of its right of way, obstructed the outlet so as to render the drain a nui-

sance. The maintenance of the drain was abandoned by the city, and in due course of time the street was graded, and thereby the need of such a drain for the benefit of the street was at an end, and unless the city was obliged to maintain perpetually the drain as originally constructed, in such manner as to protect the adjoining low grounds of the citizens, appellants had no cause of action. The exercise of the city's power to establish the drain for carrying off the surface-water was discretionary, and the right to discontinue the maintenance thereof must also be regarded as discretionary, where, by so doing, the adjoining proprietor was left in no worse condition than before the construction of the drain, and was merely put to the necessity of filling his lot in order to exclude the surface-water not brought there by the city. *Abbott, Mun. Corp.*, §958; 2 *Dillon, Mun. Corp.* (4th ed.), §§1039, 1041, 1046; 5 *Thompson, Negligence* (2d ed.), §5881; *Town of Monticello v. Fox* (1892), 3 Ind. App. 481; *Weis v. City of Madison* (1881), 75 Ind. 241, 39 Am. Rep. 135; *Cairo, etc., R. Co. v. Stevens* (1881), 73 Ind. 278, 38 Am. Rep. 139; *Rutherford v. Village of Holley* (1887), 105 N. Y. 632, 11 N. E. 818.

In the case of *Collins v. City of Waltham* (1890), 151 Mass. 196, 24 N. E. 327, surface-water flowed down a series of streets into a connecting street by open gutters, thence overflowed adjoining lands and flooded the plaintiff's land, to his injury. The streets were substantially at the grade of the surrounding lands, and it did not distinctly appear that the water which came in open gutters would not come down and flood the plaintiff's land to the same extent if there were no streets at all. There was an underground drain in the connecting street which relieved the flow somewhat, but the inlet was sometimes stopped up. It was held that the city was not liable for any damages to the plaintiff. In the case of *City of Atchison v. Challiss* (1872), 9 Kan. 603, it is said to be well settled that a city is not bound to construct any

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channel, culvert, sewer or drain to carry off surface-water, and it was held that after the city has constructed a sewer or drain to carry off surface-water it may discontinue it and make no further use of it, if thereby it does not leave an individual in a worse condition than if no sewer or drain had ever been constructed. See, also, *Waters v. Village of Bay View* (1884), 61 Wis. 642, 21 N. W. 811.

There being no liability of appellee upon the undisputed facts, there could be no available error in the exclusion of the various items of offered evidence not materially
 2. changing the state of facts, nor in directing a verdict for appellee. Appellants have not shown reversible error.

Judgment affirmed.

BARTH v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 6,937. Filed January 7, 1910. Rehearing denied February 25, 1910.]

1. RAILROADS.—*Rights of Way.—Contracts.*—A railroad company receiving a grant of a right of way on which to build switches must abide by the conditions of such grant. p. 436.
2. RAILROADS.—*Violating Easement Rights.—Increase of Hazard.*—A railroad company that violates the provisions of a right of way contract, thereby increasing the hazard to the grantor's property, can be enjoined. p. 436.

From Floyd Circuit Court; *William C. Utz*, Judge.

Suit by Elizabeth Barth against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

John D. Welman and *Charles L. Jewett*, for appellant.

M. Z. Stannard and *McIntyre, Bulleit & James*, for appellee.

ROBY, J.—Appellant is the owner of certain lots in New Albany. On September 2, 1903, she executed an instrument

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in writing, by the terms of which she authorized appellee to construct and operate a side-track across said real estate, thereby connecting its main track with two certain manufacturing establishments. It was specified that the width of land to be occupied for this purpose should not "exceed fourteen feet," and the description of the track to be constructed was otherwise as follows: "Beginning at a point in the southerly main track of the aforesaid railway east of Eighth street at New Albany station, on the Louisville division of said railway, in the county of Floyd, State of Indiana, and extending southeastwardly to the west line of Eleventh street, projected southwardly to the Ohio river, in said city." A blueprint showing said track in its entirety is made an exhibit to said instrument. The course of Eleventh street is at right angles to appellee's main line, and the east side of Eleventh street is shown as the eastern terminus of the siding.

Plaintiff in her complaint avers that defendant in disregard of the limitations contained in said contract, has partially constructed and is about to lay down a railroad track extending indefinitely east of Eleventh street, for the purpose of operating and running trains of cars and locomotives thereon and transporting goods in the transaction of business in certain factories and elevators erected and being erected east of Eleventh street; that such addition to said track will greatly increase the traffic over plaintiff's said lots; that the movement of cars and engines will be practically continuous; that plaintiff's buildings will be subjected to an additional hazard from fire; that said real estate will be depreciated in value by such additional use, and that great and irreparable damage will be suffered, unless the defendant be enjoined from making the contemplated addition to, and the use of, said track. The court sustained a demurrer to this pleading. Plaintiff refused to plead further, and appeals.

Appellee sustains its judgment by the statement of two

propositions: (1) That the contract is an executed license from, and not a lease by, appellant; (2) that the acceptance of the license and the expenditure of large amounts of money thereunder estop appellant from revoking it. Ap-

1. pellee's right in appellant's real estate is measured by the contract formed by its acceptance of her written grant. *Alcorn v. Morgan* (1881), 77 Ind. 184. It is limited by an instrument which does not confer the right to extend the siding beyond Eleventh street. It is simply a matter of abiding by a contract. This will have to be done by both parties. Appellee may as well appropriate twenty-five or one hundred feet in width across appellant's lots as to extend the switch as it proposes.

The case made is a proper one for injunctive relief. That there is some hazard to a frame building, situated in proximity to a railroad track, from fire, made necessary

2. by the use of steam-power, is well known. That the increased use of the track will increase such hazard is succinctly averred. Appellant ought not to be required to take such additional chances. *Ferris v. American Brewing Co.* (1900), 155 Ind. 539, 52 L. R. A. 305; *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Simpson v. Pittsburgh, etc., Glass Co.* (1902), 28 Ind. App. 343.

Judgment reversed and cause remanded, with instruction to overrule the demurrer to the complaint and for further proceedings.

SAYLOR, ADMINISTRATOR, v. OBENDORF.

[No. 6,542. Filed November 3, 1909. Rehearing denied January 14, 1910. Transfer denied February 25, 1910.]

1. TRIAL.—*Taking Case from Jury.*—*Appeal.*—A directed verdict for the defendant can be upheld, on appeal, only where the facts, together with the inferences therefrom, most favorable to the plaintiff, wholly fail to entitle him to any relief. p. 438.
2. CONTRACTS.—*Support.*—*Failure to Conform.*—*Damages.*—Where the plaintiff's decedent conveyed her farm to her son, such son

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agreeing to furnish, for her, firewood, vegetables, apples and cider, and the evidence, in an action by her administrator for damages, fails to show that any vegetables or apples were raised on the farm thereafter, or that any cider was made, and further shows that such son furnished some of the wood used by the grantor, and agreed with the person who furnished the remainder to pay for it, no breach of the contract is shown. p. 439.

2. TRIAL.—*Directing Verdict.*—*Proving Different Cause of Action.*—*Variance.*—Where the evidence shows a wholly different cause of action from the one alleged, a verdict for defendant should be ordered. p. 440.

From Dekalb Circuit Court; *Emmet A. Bratton*, Judge.

Action by Joseph Saylor, as administrator with the will annexed of Mary Kurtz, against Jacob Obendorf. From a judgment for defendant, plaintiff appeals. *Affirmed.*

P. V. Hoffman and *Frank A. Brink*, for appellant.

E. B. Dunton and *J. E. & J. H. Rose*, for appellee.

MYERS, J.—This was an action by appellant against appellee, based upon a certain written contract entered into September 29, 1897, between appellee and appellant's decedent, whereby it is alleged that appellee agreed, in consideration of said decedent's conveying to him certain land, that he would satisfy certain debts of decedent, pay her \$500 in cash, and furnish her "with the necessary vegetables, apples, and one barrel of cider each year, and also furnish her with the necessary firewood during her life," but that appellee, upon demand by decedent, failed to furnish the articles therein stipulated to be furnished; that decedent died in 1907, and that said contract had been lost or destroyed; that the articles to be furnished by appellee to decedent and not furnished were of the value of \$1,000, for which judgment is demanded.

The complaint, the answer in four paragraphs and a reply in general denial formed the issues submitted to a jury for trial. At the conclusion of plaintiff's evidence the court instructed the jury to return a verdict for the defendant. Plaintiff's motion for a new trial, for the reasons therein

stated—that the verdict is not sustained by sufficient evidence, and is contrary to law, and error of the court in instructing the jury to return a verdict for defendant—was overruled, and final judgment rendered in favor of defendant.

The overruling of plaintiff's motion for a new trial is assigned as error. The question is, Did the court err in peremptorily instructing the jury? The answer to

1. this question requires us to consider the evidence, keeping in mind that this particular action of the court "can only be upheld where, after a consideration of all the evidence most favorable to plaintiff, together with all reasonable and legitimate inferences which a jury might have drawn therefrom, it can be said that the evidence is clearly insufficient to establish one or more facts essential to the plaintiff's right of action." *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413.

The evidence, about which there is little or no conflict, shows that on September 29, 1897, Mary Kurtz, appellant's decedent, was the owner of certain lands in Dekalb county, which she conveyed to her son, appellee herein; that the consideration recited in the deed was \$3,100; that, concurrently with the execution of the deed, the grantor and grantee therein entered into a written contract, which thereafter and prior to the commencement of this action had been lost or destroyed. Only one witness, the scrivener, undertook to detail the contents of that instrument. This witness testified that the true consideration for the deed, as stated in the contract, was that the grantee should pay the then existing debts of the grantor, and furnish her, during her life, with necessary firewood and vegetables, and, in the fall of each year, apples and one barrel of cider, when there was an apple crop. The evidence also shows that appellee furnished the timber from which eight cords of wood was cut; that the decedent lived with her daughter, the wife of appellant, who resided, for five or six years after the execution of the deed, on a ten-acre tract, the property of a third person, ad-

joining the land conveyed, and then moved to another farm about one mile distant, where they lived at the time of the death of decedent; that she died testate, and by the terms of her will all of her property was devised to said daughter and her husband, the appellant; that during the time decedent resided with her said daughter she was physically unable to do any work, and it was necessary to keep one fire burning day and night during the entire year, except in the summer when it was necessary to have a fire in the heating stove nearly every evening; that in the house where decedent lived appellant maintained one heating stove and one cook stove; that the entire household had the benefit of and were warmed by the same fire; that the wood, except eight cords, was provided by appellant, estimated at thirty cords each year for the heating stove, and worth from \$1.50 to \$2 a cord delivered. It also appears that with the exception of the eight cords no part of the wood came from appellee's farm; that appellee, upon one or two occasions, during the spring of 1899, made inquiry of appellant as to his having wood, and said that he (appellee) had no more wood than he needed; but that he was to furnish his mother wood, and that appellant should go ahead and get it, and said: "I will see that you get your pay." Appellant replied that he would, and he did furnish the wood. On the farm conveyed was an apple orchard, and, from the entire evidence, the only inference to be drawn is that the parties to said contract had reference to apples grown in that orchard.

We have endeavored to state the facts and inferences to be drawn from the evidence as favorably to appellant as the record will justify. Therefore, keeping in mind

2. the gist of the action, appellee's failure to furnish firewood, vegetables, apples and cider, and the proof relative thereto, it will be seen that there is absolutely no evidence that during the ten years in question any vegetables or apples were grown on the farm conveyed by decedent to

appellee, nor is there any evidence as to the quantity of these articles necessary for decedent's use, or the value of such articles as a basis of recovery. As to the wood, it does not appear that the decedent ever had any cause for complaint. It is shown that only eight cords of wood was cut from the land conveyed, while thirty cords each year were necessary for the comfort of decedent, and that appellee had said that he had no wood other than for his own use; and it appears that by an arrangement between appellee and appellant, to which decedent was not a party, the necessary firewood was actually furnished. From the evidence, it cannot be said that Joseph Saylor furnished the wood because of a refusal of appellee to do so, or because of any request by the decedent, but it is clear that Saylor, a stranger to the original contract, did furnish it at the request of appellee, on the strength of appellee's promise to pay therefor.

The complaint, in this case, proceeds upon the theory of a liability to the decedent's representative, while the evidence makes out a *prima facie* case against appellee and in

3. favor of Joseph Saylor, personally, and is therefore within the rule forbidding a recovery where the evidence makes out a case materially different from the case made by the pleadings. *Borders v. Williams* (1900), 155 Ind. 36, and cases cited. Had appellant's decedent employed Saylor to supply her with firewood, because of appellee's refusal so to do, and this was a suit by Saylor to collect from appellee the reasonable value of the wood furnished by him, we would have a state of facts not unlike the facts in the case of *Huffmond v. Bence* (1891), 128 Ind. 131. But the facts in that case being so widely different from the facts in the case at bar, it is without influence.

Judgment affirmed.

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**FOWLER v. FORT WAYNE AND WABASH VALLEY
TRACTION COMPANY.**

[No. 6,730. Filed March 8, 1910.]

1. PLEADING.—*Complaint.—Theory.*—A complaint should proceed upon a definite theory. p. 443.
2. RAILROADS.—*Interurban.—Injuries on Highways.—Frightening Horses.—Complaint.*—Where a complaint alleges that defendant interurban railroad company negligently ran its car along the highway upon which the plaintiff was traveling in a buggy, that the plaintiff's horse became frightened thereat, to defendant's knowledge, and that the defendant refused to stop its car, thereby causing such horse to throw the plaintiff from her buggy, to her injury, such charge of negligence is the gist of the action, and is the only charge defendant should be expected to meet. p. 443.
3. RAILROADS.—*Interurban.—Use of Highways.—Nuisance.*—The authorized use of a public highway by an interurban railroad company does not of itself constitute a nuisance. p. 443.
4. APPEAL.—*Instructions.—How Made Part of Record.*—Where the word "given," or the word "refused," was written before each of the instructions set out in the transcript, such instructions can not be considered a part of the record, the statute (§501 Burns 1908, Acts 1907, p. 652) requiring a memorandum showing which instructions were given and which refused, signed by the judge, at the close of the instructions. p. 444.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Anna Fowler against the Fort Wayne and Wabash Valley Traction Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Haag & Stewart, for appellant.

Lairy & Mahoney and *Barrett & Morris*, for appellee.

MYERS, C. J.—This was an action by appellant against appellee to recover damages for a personal injury. The complaint was answered by a general denial, and, upon a trial by jury, a verdict was returned in favor of the appellee. The appellant's motion for a new trial was overruled, and this ruling alone is assigned as error.

The complaint alleged that the defendant was a corporation organized and doing business under and in pursuance

of the laws of this State, and was the owner of and operating a system of electric railway in and through the county of Miami in said State; that on a day named it was engaged in transporting, for hire, persons in cars which it caused to be propelled along rails and tracks owned and maintained by it on and along a certain common and public highway leading from the east to the city of Peru; that on said day plaintiff and her husband were driving their horse, hitched to an open buggy, eastward from said city, and on and along said highway, when the defendant with one of its city cars, known as car No. 19, passed plaintiff and her husband on said highway; that said defendant proceeded with its car eastward until it reached a certain point, when it stopped, and started on the return trip, meeting plaintiff and her husband traveling on the highway in said buggy; that said horse had always been gentle, quiet, safe and easily managed, even in the presence of and near proximity to street-cars, electric cars and steam railroad cars. It is then alleged that said car was uncommonly long, and so constructed that when being operated it would rock, and swing up and down at the ends, thereby causing the fenders attached to each end of the car to toss upward and downward, which they did as the car approached plaintiff and her husband in said buggy, thereby frightening plaintiff's horse drawing said buggy, so that he reared, backed and plunged forward, throwing plaintiff with great force from the buggy upon the hard gravel roadbed of said highway, on account of which she was severely bruised, etc. (describing her injuries, and stating her damages); that said injuries to plaintiff were caused wholly by the negligence of the defendant in so carelessly and negligently operating and running its said car that it would rock, and swing up and down at the ends; that defendant's motorman and conductor, in charge of said car, knew by the actions of said horse that it was frightened by said car, and they had sufficient time to avoid the accident by stopping the car, but disregarded their duty

to stop, and proceeded with the car toward plaintiff, knowing that injury to plaintiff was inevitable.

The evidence relating to the question of negligence on the part of appellee, as well as upon the part of appellant, was of such a character that, under well-settled principles affecting the relative rights and duties of the parties in the use of the highway, it was proper to leave the decision of those matters to the jury. In this connection, appellant lays especial stress upon the fact, shown by the evidence, that the accident occurred upon a public highway outside the limits of a city or town, and it is contended that, inasmuch as it appears that the railway was constructed and operated longitudinally upon the highway, on which appellant was riding in a vehicle drawn by a horse which took fright at appellee's interurban car, the case should be treated as an action for injury caused by a nuisance. Or, in other words, it is insisted by the appellant that this should be treated as a cause of action for an injury arising from an unlawful occupation and use of the public highway longitudinally by appellee. In order to show the fallacy of this argument, we have taken

space to show the purport of the complaint; for it is

1. well settled that every action must proceed upon some definite, legal theory, and defendant should be apprised of plaintiff's theory by the direct averments of the complaint. Plainly, the only cause which appellee could be expected to prepare to combat was one for injury
2. negligently inflicted by the employes of appellee in charge of the particular car, at a definite time and in a certain place.

That an electric, suburban or interurban railway company may construct and use a railroad upon a public highway, outside the limits of a city, under permission granted

3. by the board of county commissioners, is as well established, so far as travelers upon the highway are concerned, as that it may construct and use its railway within the corporate limits of a city by permission of the proper

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municipal authorities. *Southeast, etc., R. Co. v. Evansville, etc., R. Co.* (1907), 169 Ind. 339, 13 L. R. A. (N. S.) 916; *Chicago, etc., R. Co. v. Whiting, etc., St. R. Co.* (1894), 139 Ind. 297, 26 L. R. A. 337, 47 Am. St. 264. Had the injury, for which appellant sought to recover damages, occurred within the corporate limits of the city of Peru, certainly such a complaint would not suggest to appellee a contest as to the validity of its occupancy and use of the city streets. The only reason for such a suggestion in this case seems to have arisen from an unfounded opinion that such use of the rural highway must necessarily be unlawful in all cases. Appellee was not, by this complaint, presented with an issue as to the lawfulness of its occupancy and use of the rural highway.

Appellant seeks to question the alleged action of the court in refusing to give certain instructions asked for by her, and in giving certain instructions requested by appellee.

4. There is no bill of exceptions relating to the instructions to the jury. It does not appear that the court gave to the jury any instructions of its own motion. It does appear that before each of the instructions in the record, whether asked for by appellant or by appellee, is the word "Given," or the word "Refused." The statute of March 12, 1907 (Acts 1907, p. 652, §561 Burns 1908), in force at the time the cause was tried, provides, as did the statute of which it is amendatory (Acts 1903, p. 338, §1), that "the court shall indicate, before instructing the jury, by a memorandum in writing at the close of the instructions so requested, the numbers of those given and of those refused, and such memorandum shall be signed by the judge." It has been decided by this court and by the Supreme Court that by such "method the court itself, without a bill of exceptions, makes the record show which of the instructions requested were given and which were refused," and that without such memorandum signed by the judge we cannot determine whether any or all of the instructions requested were given or refused. *Inland Steel Co. v. Smith*

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(1907), 168 Ind. 245; *Inland Steel Co. v. Smith* (1907), 39 Ind. App. 636; *Baker v. Gowland* (1906), 37 Ind. App. 364; *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348; *Petrie v. Ludwig* (1908), 41 Ind. App. 310; *Supreme Tent, etc., v. Ethridge* (1909), 43 Ind. App. 475; *Holcomb v. Norman* (1909), 43 Ind. App. 506. Appellant, therefore, has not saved any question relating to the giving or to the refusing to give any of the instructions requested by the parties. Judgment affirmed.

KNICKERBOCKER ICE COMPANY v. SMITH.

[No. 6,697. Filed March 8, 1910.]

1. **MASTER AND SERVANT.—Injury to Fellow Servant.—Complaint.—Allegation that "Defendant" Was Negligent.**—A complaint alleging specifically that the plaintiff's fellow servant negligently operated the dipper by which plaintiff was injured, and also that "defendant" company did so, shows that the injury was caused by the act of such fellow servant. p. 449.
2. **PLEADING.—Complaint.—Sufficiency of.**—A complaint must state facts in such language that a person of common understanding may know what is intended. p. 449.
3. **MASTER AND SERVANT.—Safe Place.—Complaint.**—A complaint for injuries received by a servant because of an unsafe working place must show that the danger was one that inhered in the place, or machinery or appliances furnished, and not to the manner of doing the work. p. 449.
4. **MASTER AND SERVANT.—Safe Place.—Rules.—Delegation of Duties.**—A master must use ordinary care to provide for his servants a safe place in which to work, safe appliances with which to work, and should adopt reasonable rules for the conduct of the work; and these duties cannot be delegated. p. 449.
5. **MASTER AND SERVANT.—Fellow Servants.—Use of Tools.—Delegation of Master's Duty.**—A master may delegate to fellow servants his duty as to the proper handling of appliances furnished, and thereby free himself from all liability for negligence therein. p. 450.
6. **MASTER AND SERVANT.—Negligence of Fellow Servants.**—A master is not liable for the negligence of fellow servants. p. 450.

7. MASTER AND SERVANT.—*Fellow Servants.*—*Negligence.*—*Complaint.*—A complaint showing that the plaintiff, while at his customary place, was injured by the fall of a sand and gravel dipper, that the defendant negligently failed to establish any rules for the operation of such dipper, that such dipper was ordinarily dumped after each dip, but that on the occasion in question, without any warning or notice thereof to the plaintiff, it was negligently dipped a second time without its being dumped, thereby injuring the plaintiff, does not state a cause of action. p. 451.

From Lake Superior Court; *Harry B. Tuthill*, Judge.

Action by Sylvester A. Smith against the Knickerbocker Ice Company. From a judgment for plaintiff for \$1,500, defendant appeals. *Reversed.*

Philo Q. Doran, Frank J. Conboy, Elias D. Salisbury and W. H. Card, for appellant.

Crumpacker & Moran, for appellee.

RABE, J.—Appellant owns a sand- and gravel-pit from which it ships by carload lots large quantities of sand and gravel. The sand and gravel are taken from the pit and loaded on cars by means of a steam-shovel. While engaged in appellant's service, in the work of operating said steam-shovel, and loading cars with sand from appellant's pit, appellee suffered an injury.

This action was brought to recover damages therefor, on the theory that appellant was guilty of negligence proximately causing the injury suffered. Appellant's demurrer to the complaint was overruled, issues were formed, the cause was tried by a jury, and a verdict was returned and judgment rendered thereon against appellant.

The sufficiency of the complaint to withstand a demurrer is presented by appellant's assignment of errors. The complaint avers that the steam-shovel used by appellant in its work was fastened to the front of a flat-car, built for the purpose, having a large crane, which carried an arm, to which was fastened a dipper or scoop, by means of which the sand and gravel were scooped out of the pit and deposited in

cars, and which crane worked on a pivot; that the construction of the machine was such that the crane, handle and dipper could be manipulated by a man in charge thereof, in such manner that it would scoop up sand and gravel within a radius of thirty feet of the pivot upon which the crane turned; that, in operating the machine, the gravel and sand were scooped up into the dipper by letting it down into the pit, propelling it forward and upward, by means of steam-power, until the dipper was filled, then raising it and swinging it by means of the crane over to the cars on a track alongside the machine, then dumping the dipper and returning it to be refilled; that the flat-car on which the machine stood rested on a temporary track, which had to be constructed in front of the car as the work progressed, and that those who laid this track worked in the space under the crane and dipper, and could only do their work in the space of time occupied in raising, dumping and returning the dipper; that the necessities of their work required them to work hurriedly, and it was their duty and custom to rush in behind and under the dipper when it was raised, and work while the dipper was being swung over and emptied, and to watch for its return after its contents had been emptied into the car, and protect themselves from injury by getting out of the way upon its return to be refilled; that the dipper would readily fill at one upward stroke; that the crane and dipper were operated by a man in charge of the steam-shovel, who worked on the forward end of the car, and who, with appellee and others, was employed by appellant to load the sand and gravel on said cars; that the dipper and handle would weigh five tons, and that it was dangerous for those engaged in extending the track to lower the dipper, after it had been raised in the act of filling, without swinging it around to the car, or without warning such men in time to enable them to get out of the way; that men employed in the work of laying the track became accustomed to the time required to swing the dipper from the pit to the

car, dump it and return, so they could easily govern themselves in their work, and avoid danger from the return of the dipper.

It is further averred that "it happened occasionally, but very rarely, that in entering the dipper in the bank, and pushing it forward to be filled, it did not fill sufficiently," and the craneman and those operating the machinery of said shovel "were required to let said dipper down and refill it," without swinging it around to the car and dumping what it contained; that the persons working on the track had no means of knowing whether said dipper was filled or not filled in the first effort, and had no means of knowing when it would be let down to be refilled without swinging it to be dumped, unless warned by defendant; that "it was the duty of defendant, whenever such was the case, to warn them, and that their working place, under the aforesaid circumstances, was highly dangerous and unsafe, unless they were so warned;" that defendant employed plaintiff to assist in laying said track for the steam-shovel, and that he worked continuously at said employment from March 25, 1906, until May 5, 1906; that defendant instructed him how and when to do said work, but negligently failed and omitted to instruct him that said dipper was liable not to fill at the first stroke, and that it was sometimes necessary to let it down again to fill it completely before swinging it around to the car and dumping it, and that defendant negligently failed to provide anyone to warn plaintiff thereof when said dipper should be so let down without being first swung around to said car and dumped, and that during the time plaintiff worked there, up until the time of his injury, it was never necessary to let down said dipper the second time in order to fill it perfectly before swinging it around to the car to be dumped; that until plaintiff was injured he did not know that such would be the fact; that on May 5, while he was engaged in discharging the duties of his employment, the defendant raised said dipper in the act of filling it, and

then, while plaintiff was performing his said work in said manner, defendant, without warning him, negligently let said dipper down again, without swinging it around to the car, as aforesaid, and thereby struck and injured plaintiff.

It thus appears that plaintiff suffered the injury complained of by the act of the craneman in letting the dipper down on him while he was engaged in the discharge of

1. the duties of his employment. It is true that the complaint averred that "defendant" let the dipper or shovel down on plaintiff, but the specific averments of the complaint, which are controlling, show that this act was performed by a servant. Two alleged omissions of duty are charged against appellant, as being the proximate cause of the injuries complained of: (1) Failure to instruct appellee of the danger to be apprehended from a second effort to fill the dipper with sand, without dumping the sand into the car; (2) failure to warn appellee that the dipper was being let down to be refilled.

The complaint, to withstand a demurrer, must directly aver facts showing a right of action in plaintiff, in such language that a person of common understanding may

2. know what is meant to be charged. Here the foundation of appellee's case rests upon an alleged existing danger, out of which danger it is claimed a duty grew owing by appellant to appellee, the neglect of which produced the injury complained of. It is not charged that this

3. danger was one that inhered to appellee's working place, or the machinery and appliances furnished by appellant to its servants to work with, but that it arose from the manner in which the work was conducted.

The law governing the relations of master and servant impose certain duties upon the master. He is bound to

4. exercise reasonable care to provide his servants with a safe place in which to work and safe appliances to work with, to adopt reasonable rules and regulations for

the conduct of the business, where the nature of the work and the circumstances of the case require it, and to warn his servants of dangers connected with the service, of which the master has knowledge and of which the servant is ignorant. These duties the master cannot delegate, and whoever performs them stands, in that respect, in the master's place. But there are certain duties the servant owes to the master, and the performance of all such duties the

5. master may delegate to servants, and in the performance of such duties the servant represents not the master but himself. Among other duties which the master may thus delegate to servants is the proper handling of appliances which the master furnishes the servants to work with in the performance of the duties they owe to him. *Chicago, etc., R. Co. v. Barker* (1908), 169 Ind. 670, 17 L. R. A. (N. S.) 542 and cases cited in notes; *Dill v. Marmon* (1905), 164 Ind. 507; *Indianapolis Terra Cotta Co. v. Wachstetter* (1909), 44 Ind. App. 550; *St. Louis, etc., R. Co. v. Needham* (1894), 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; *Howard v. Denver, etc., R. Co.* (1886), 26 Fed. 837.

The master has a right to presume that his servants, in the performance of their duties to him, in handling and using the appliances and tools with which they are fur-

6. nished, will exercise reasonable precaution not to injure each other, and for their careless use of such instruments, by which a fellow servant is injured, the master is not responsible. 1 Labatt, Master and Serv., §30v, and authorities cited. In the case of *Chicago, etc., R. Co. v. Barker, supra*, the Supreme Court said: "The full test of liability is not the condition of the place nor the machinery at the instant of the injury, but the character of the duty, the negligent performance of which caused the injury." In the case of *Howard v. Denver, etc., R. Co., supra*, Justice Brewer, speaking for the court, said: "The true idea is that the place and instruments must in themselves be safe. for this is what the master's duty fairly compels, and not

that the master must see that no negligent handling by an employe of the machinery shall create danger.”

It appears from the complaint that the appellee was injured while engaged in the regular duties of his employment at a place where such duties were regularly to be

7. performed; that the injury was not the result of any inherent danger in the place, nor of any defect in the machinery furnished by appellant for appellee to work with, but that it resulted from the act of a fellow servant in manipulating a machine in the performance of the work in which they were both engaged for the common master; and, from the facts averred in the complaint, we think the inference fairly arises that appellee’s working place and his position therein at the time of the injury were plainly visible to appellant’s servant operating the dipper.

It is appellee’s theory that appellant is liable for the injury complained of, because it was the duty of appellant to adopt rules and regulations for the conduct of its business that would have protected its servants from such an accident, and that upon the failure of the dipper to fill at the first dip, the letting of it back for a second effort, without dumping, was a part of appellant’s system of carrying on the work. The facts averred in the complaint, upon which this theory is predicated, are that it happens occasionally, but very rarely, that in entering the said dipper in the bank, and pushing it forward to be filled, it does not fill sufficiently, and the craneman and those operating the machinery of said steam-shovel are all required to let said dipper down again and refill without swinging it around to the car and dumping what it contains. By whom these servants are required thus to proceed with their work is not disclosed. It is not averred that this was done by any direction of the appellant, nor that the appellant had adopted any rule requiring the craneman to operate the dipper in this or any other particular manner. So far as appears from the facts averred in the complaint, the method of operating the dipper

—whether it should be dumped at each dip or should not be dumped until it was entirely filled—was left to the discretion of the craneman who operated it, and it affirmatively appears from the description of the machinery and the manner of its operation that it could be dumped as readily when partially filled as when entirely full; so that, notwithstanding the averment that those who operated the crane were required to return the dipper for refilling without first dumping it in the car, in case of its failing to fill at the first effort, it appears that the dipper was returned to the pit without dumping simply because the craneman chose to perform the work that way, and not because of any direction or requirement of appellant. Nor do the facts present such a case as required appellant to adopt some rule describing the particular manner in which the craneman should fill and dump the dipper. Appellant could properly leave that detail of the work to the discretion of its servant in charge of the crane and dipper, and had the right to presume that such servant would not suddenly and at some unexpected moment, on some rare and especial occasion, drop the dipper down on the heads of his fellow workmen engaged in their duties immediately under his eye, without notice or warning to them. Nor was appellant bound to stand over his servants while thus engaged at their work in order to warn them of a danger of rare occurrence, and which would arise solely from the manner in which the work was performed.

We are cited by appellee's learned and industrious counsel to a large number of authorities in support of his contention that appellant owed appellee a duty to warn and instruct him in reference to the danger of injury from the manner in which the craneman operated the dipper, all of which we have carefully examined, and none of which we think are in point in this case. The strongest case in support of appellee's contention, to which our attention has been called, is that of *Belleville Stone Co. v. Mooney* (1897), 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834, which seems not to be in

entire harmony with other adjudications along the same line, but, however, the case cited is very easily distinguishable from the case made here. In the case cited, an employe of a stone-quarry was injured as the result of a blast fired in the quarry in the usual course of the business, for the purpose of loosening the stone, and defendant was held liable for its failure to warn the employe in time to enable him to escape from the falling debris. The firing of the blast to loosen the rock was one of the regular and necessary incidents of the work, and involved a constantly recurring danger to those engaged at work in the quarry. After the fuse that fired the blast was once lighted the explosion was inevitable. It was not under the control of some servant of the company, and the resulting danger to the workmen was not dependent upon the act of such servant. The blast was bound to explode, and the shattered stone would fall where it listed, and it does not seem unreasonable that in the conduct of a business of this character, involving danger arising, as it naturally would, from the firing of such blasts, the master should be required to make proper provision for warning his employes at work in the quarry in time to enable them to escape injury therefrom, and that his failure to do so, or the failure of the person charged with that duty, would constitute negligence on his part. But where the danger arises solely from the manner in which a fellow servant operates a tool or machine furnished him to work with, a different question is presented, and such is the question here.

We are cited to numerous cases in which servants have been, by order of the master, taken out of the regular line of their employment, and, without warning, set to work in dangerous places, or with dangerous appliances, of whose dangers they were ignorant. None of these cases apply to the facts here involved. The case of *Gould Steel Co. v. Richards* (1903), 30 Ind. App. 348, cited by appellee in support of his contention, is to be distinguished from the case at bar, in that, there, while the injury to the servant occurred through

plaintiff's being struck and injured by a moving crane, and the charge of negligence was predicated upon the act of the master in causing the crane to be set in motion without warning to plaintiff, while he was engaged at work in a place which the movement of the crane rendered dangerous, the movement of the crane was at the direction of the master, not of a fellow servant. Here the movement of the dipper, rendering appellee's working place dangerous, was the act of the fellow servant, not the master or vice-principal. The case of *Gould Steel Co. v. Richards, supra*, is governed by the following rule laid down in 1 Labatt, Master and Serv., §209: "No order with respect to change of position of the subject of the work shall be executed without due warning to the employe. This principle is exemplified in a class of cases involving injuries * * * produced by the fact that some heavy object not under the control of some particular servant passes at intervals along certain lines through the space in which a servant is required to work." See *Stewart v. Philadelphia, etc., R. Co.* (1889), 8 Houst, (Del.) 450, 19 Atl. 639. The rule could manifestly have no application here, because here, the object passing through the space in which appellee was required to work, and creating the danger, was under the absolute control of a fellow servant, as much so as though it had been a shovel or sledge used in his hands. Under the facts averred, no liability on the part of appellant for the injuries alleged to have been sustained was shown. The demurrer to the complaint should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

POETKER, RECEIVER, v. TINDLE ET AL.

[No. 6,995. Filed March 8, 1910.]

1. **APPEAL.—***Weighing Evidence.*—Where there is any evidence supporting the facts essential to the judgment appealed from, it will be affirmed on appeal. p. 456.
2. **BILLS AND NOTES.—***Evidence.—Questions for Jury.*—Whether the maker of a note deposited it in bank to cover a possible overdraft, and whether he received credit therefor as a deposit, are questions for the court or jury trying the case. p. 456.

From Dubois Circuit Court; *E. A. Ely*, Judge.

Action by Fred H. Poetker, as receiver of the People's State Bank, against Harve Tindle and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

R. W. Armstrong and *Leo H. Fisher*, for appellant.

Crow & Sumner, *David D. Corn* and *Ely & Greene*, for appellees.

COMSTOCK, J.—Action by appellant against appellees on a promissory note given to the People's State Bank of Huntingburg, Indiana, for the sum of \$700, and dated August 21, 1905. The complaint as originally filed in the Pike Circuit Court consisted of two paragraphs. Upon change of venue to the court below the first paragraph was dismissed. To the second paragraph appellees answered in five paragraphs: (1) No consideration; (2) payment; (3) *non est factum*; (4) no consideration and that said note was deposited as collateral only; (5) general denial. Appellees also filed a cross-complaint in two paragraphs. The first alleges no consideration for the note in controversy, asks that the appellant be ordered to surrender said note, and that it be declared void. The second paragraph, in substance, alleges that the defunct bank, of which appellant is receiver, was organized and was, until placed in the hands of appellant as receiver, doing a general banking business under the laws of the State of Indiana; that during appellee Tindle's business

relations with said bank (January 28, 1903, to October 15, 1906) he deposited with said bank the sum of \$27,858.30, and that during that time said Tindle drew out by check, draft and otherwise the sum of \$26,899.58; that there is now, and was at the date of the filing of this suit, in the possession of said bank and said receiver the sum of \$958.72 belonging to said Tindle; that said bank refused to pay said sum or any part thereof; that said sum is now due and unpaid. Appellees also filed answer by way of set-off, setting up substantially the same facts as alleged in the second paragraph of cross-complaint, and asking that said indebtedness be set off against any sum that might be found due to appellant.

To each of said affirmative answers and to each paragraph of cross-complaint and set-off, respectively, appellant filed a general denial. Upon the issues thus formed the cause was tried by the court, resulting in a finding for defendants on plaintiff's complaint and the answers thereto, and against defendants on their cross-complaint. Over appellant's motion for a new trial judgment was rendered in accordance therewith.

The ruling on the motion for a new trial is assigned as error, and upon this appeal the sufficiency of the evidence to sustain the finding and judgment of the court is

1. challenged. If there is competent evidence to support every material point involved, the judgment should be affirmed; but if there is an entire failure of proof as to a fact essential to support the judgment, it should be reversed.

An examination of the evidence discloses that on August 21, 1905, appellee Tindle executed the note sued on to the receiver's bank, with appellees Davidson and Vaughn

2. as sureties. The bank became insolvent and appellant was appointed its receiver on January 14, 1907. Tindle could neither read nor write, except that he had

learned to write his own name, but had been doing business with and had been a customer of said bank for several years, and, in the course of his business, had deposited therein from January 28, 1903, to October 15, 1906, the sum of \$27,858.30, and during that period had withdrawn \$26,411.01, leaving a balance due him of \$1,447.29. By his testimony the only method Tindle had of keeping account of his dealings with said bank was by checks returned and by statements sent to him by the bank from time to time. Tindle was engaged in the business of buying cattle and other stock. His account with said bank at times was largely in his favor and at other times it was overdrawn. In November, 1904, defendant Tindle, to protect the bank from his overdraft, executed a note (the note upon which the first paragraph of complaint was based), for \$700. Said note was executed for the sole and only purpose of covering any overdraft Tindle might make and to protect the cashier from censure in allowing him to overdraw his account. This note was signed by Tindle, Davidson and Vaughn. Tindle at no time discounted said note and at no time had the proceeds placed to his credit. On August 21, 1905, the cashier informed Tindle that said note was lost, and requested him to make another, which was done, and the new note was placed as collateral, securing against any overdraft, and was not to be discounted and not to be placed to Tindle's credit. As to the purpose of the execution of the second note, whether it was discounted and whether appellee Tindle was given credit therefor, there is conflicting testimony. Said appellee testified that it was given only to take the place of the first note, and that it was never discounted and never placed to his credit. Circumstances are shown which corroborate said testimony. There is also a conflict as to whether Tindle ever paid any interest on the note in question. There is evidence that cashier Behrens, during the history of this transaction, gave as excuses for not returning to Tindle the note

at a time it was to have been surrendered to him, that there was nothing due thereon; that it would not cause him any trouble; that it had not been discounted; that he had misplaced it, but as soon as he found it he would send it to him. Witness Behrens did not in terms dispute this, but said that he did not remember. Tindle kept a combination deposit and check book, in which the cashier noted down the items of his account whenever he made a deposit in person. He took this book to the bank the day he left the note, and no one entered a deposit thereon to his credit. One witness testified that he saw Tindle's pass-book on the day he took said note to plaintiff's bank immediately after he (Tindle) returned therefrom, and that no credit for \$700 or for any other sum was entered therein for that day.

The evidence is voluminous, extending over 700 pages of typewritten matter. The questions depend upon the evidence alone. To attempt to set out and comment upon its inconsistencies and contradictions would make this opinion a very long one without any corresponding profit. The evidence is both documentary and oral. Leaving, under the well-recognized rule, to the trial court its weight and credibility, it is sufficient on all material points to sustain the finding and judgment.

Judgment affirmed.

HILL v. WARD.

[No. 6,755. Filed March 8, 1910.]

1. **BILLS AND NOTES.**—*Consideration.*—*Want of.*—*Failure of.*—*Burden of Proof.*—*Answer.*—Where the plea to a complaint upon a negotiable note is the want, or failure, of consideration, the burden of showing that the indorsee was not a *bona fide* holder is upon defendant. p. 460.
2. **BILLS AND NOTES.**—*Defenses.*—*Notice of, by Indorsee.*—*Answer.*—An answer, in an action by a second indorsee of a negotiable note, that such indorsee at the time of the indorsement had

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notice of the alleged defense, is bad for failure to allege that the first indorsee also had notice of such defense. p. 460.

3. **BILLS AND NOTES.—Innocent Purchasers.—Subsequent Indorsees.**—All subsequent indorsees from an innocent purchaser of a negotiable note take it free from all defenses not available against such innocent purchaser. p. 462.
4. **BILLS AND NOTES.—Fraud.—Illegality.—Burden of Proof.**—Where fraud or illegality is pleaded as a defense to an action by an indorsee upon a negotiable note, the burden is upon such indorsee to show that he is a *bona fide* purchaser. p. 464.
5. **BILLS AND NOTES.—Consideration.—Illegality.—Performing Medical Services.—Want of License.**—A note given in payment of certain medical treatment to be rendered by the payee is void, where such payee was not licensed to practice medicine, such practicing without a license constituting a misdemeanor. p. 464.
6. **PLEADING.—Complaint.—Consideration of.—Evidence.**—In determining the sufficiency of a complaint, the evidence cannot be considered. p. 465.

From Noble Circuit Court; *Joseph W. Adair*, Judge.

Action by Frank R. Hill against James B. Ward. From a judgment for defendant, plaintiff appeals. *Reversed.*

L. W. Welker and *Blacklidge & Wolf*, for appellant.

Weir D. Carver, for appellee.

HADLEY, J.—Appellant sued appellee on a promissory note, averring that said note was executed by appellee to one Doremus, at the Noble County Bank, Kendallville, Indiana; that before maturity Doremus assigned the note by indorsement to one Freeman, who, before maturity, assigned it by indorsement to appellant. To this complaint appellee answered in four paragraphs: (1) General denial; (2) plea of no consideration with knowledge of appellant; (3) failure of consideration and assignment to appellant after maturity; (4) fraud in the procurement of the note and appellant's knowledge thereof. Demurrers were overruled to the second, third and fourth paragraphs of answer. These rulings are assigned as error. It is urged that the second paragraph of answer is insufficient, for the reason that it does not aver that the first indorsee was not a *bona fide* holder of the paper.

It is a well-settled rule of law that under a plea of no consideration or failure of consideration to the suit by an indorsee on a negotiable note the burden is upon the

1. defendant to show that the indorsee was not a *bona fide* holder in all that that term implies. *First Nat. Bank v. Ruhl* (1890), 122 Ind. 279; *Hinkley v. Fourth Nat. Bank* (1881), 77 Ind. 475; *Shirk v. Mitchell* (1894), 137 Ind. 185, and cases cited. In the case of *First Nat. Bank v. Ruhl*, *supra*, the court said: "There is, however, at least one paragraph of the answer which is clearly bad, and that is the paragraph which pleads want of consideration. This paragraph is bad because it does not aver that the plaintiff was not a purchaser for value and in good faith. The authorities discriminate between cases in which a note is obtained by fraud and those in which there is a want or total failure of consideration. There is reason for this distinction. It often happens that one man executes a note without consideration for the accommodation of another and no one would think of declaring that it would not be valid in the hands of one who paid value for it before maturity, although he may have known that it was executed without consideration."

The paragraph of answer in question does aver that appellant had notice of the defense alleged, but this is not sufficient. Appellant was a second indorsee, and the law

2. is that he has the same rights and his claim is subject only to the same defenses that might be interposed as against his indorser, even though at the time he purchased he had notice of such defense as against the maker. *Hereth v. Merchants Nat. Bank* (1870), 34 Ind. 380; *Riley v. Schwacker* (1875), 50 Ind. 592; *Peckham v. Hendren* (1881), 76 Ind. 47; *McCardle v. Barricklow* (1879), 68 Ind. 356; *Hinkley v. Fourth Nat. Bank*, *supra*; *Bassett v. Avery* (1864), 15 Ohio St. 299; *New v. Walker* (1886), 108 Ind. 365, 58 Am. Rep. 40; *Peabody v. Rees* (1864), 18 Iowa 571; *Fairclough v. Pavia* (1854), 9 Exch. 689; *Eckhert v. Ellis*

(1882), 26 Hun 663; *Woodman v. Churchill* (1862), 52 Me. 58; *Wilson v. Mechanics Sav. Bank* (1863), 45 Pa. St. 488; *Lewis v. Long* (1889), 102 N. C. 206, 9 S. E. 637, 11 Am. St. 725; *Smith v. Hiscock* (1837), 14 Me. 449; 1 Daniel, *Negotiable Inst.* (4th ed.), §726a. In the case of *Hinkley v. Fourth Nat. Bank*, *supra*, the court uses this language: "An acceptor of a bill of exchange cannot shift the burden upon the indorsee by proving that he received no consideration for his acceptance. There is a double burden upon such an acceptor. He must not only show that he accepted without consideration, but he must show that there was no consideration between the indorsee who sues and his immediate indorser."

The reason for the rule is well stated in the case of *Bassett v. Avery*, *supra*. In that case Bassett was a second indorsee, one Barrett being his immediate indorser, and it was contended that, notwithstanding Barrett had no notice of the defense, since Bassett had, the defense was available. The court held to the contrary, and in passing upon the question, said: "The reason why notice lets in a defense, in cases in which, without notice, it could not be set up, is the bad faith involved in the purchase. But if a party holds a negotiable instrument discharged of defenses which may have existed between the antecedent parties, no reason is perceived why his right of sale should be any more restricted than his right to collect. The liability of the maker is then fixed. It is not increased by a subsequent sale or gift of the note to another; and it would be inconsistent that the law should recognize a perfect title in a party, and yet limit his power of disposition in the manner claimed. Nor do we perceive the principle upon which a knowledge of the prior infirmity can be made the ground of imputing bad faith to a purchaser in no way responsible for the wrong in obtaining the paper, or putting it in circulation. Notwithstanding its former invalidity he knows that it has now become valid. Payment alone, by the maker, will dis-

charge it, and, to him, it must be a matter of indifference, whether it be made to the holder or his indorsee." In the case of *Hereth v. Merchants Nat. Bank*, *supra*, the court said: "It is well settled, that the purchaser of commercial paper from one who is an innocent holder for value, may recover on it, notwithstanding he knew that there were defenses against the note, at the time he took it." The second paragraph of answer to be sufficient as a defense should aver not only that appellant was not a good-faith purchaser, but that his indorser was likewise in *mala fides*.

The third paragraph of answer for the same reason is insufficient. It is said by the learned author in 1 Daniel,

Negotiable Inst. (4th ed.), §726a: "A transferee

3. can generally get as good a title as his transferer possesses, and it is, therefore, a settled principle that if the party who transferred the instrument to the holder acquired the note before maturity, and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue and dishonored at the time of transfer." In the case of *Cromwell v. County of Sac* (1877), 96 U. S. 51, 59, 24 L. Ed. 681, Field, J., says: "The rule has been too long settled to be questioned now, that, whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition." And to the same effect are the cases of *Riegel v. Cunningham* (1874), 9 Phila. (Penn.) 177; *Roberts v. Lane* (1874), 64 Me. 108, 18 Am. Rep. 242; *Woodman v. Churchill*, *supra*; *Wilson v. Mechanics Sav. Bank*, *supra*; *Smith v. Hiscock*, *supra*; Chitty, Bills and Notes (12th Am. ed.), *220. Measured by the foregoing authorities, the third paragraph was insufficient in not averring the right to set up the defense as against appellant's immediate indorser.

The fourth paragraph of answer avers in substance that the note sued upon was procured by the payee, Doremus, from appellee by fraud and false representation, in this, that prior to the making and delivery of said note said Doremus falsely and fraudulently represented to appellee that he (Doremus) was a regular practicing physician, licensed to practice medicine in Noble county pursuant to the laws of the State of Indiana; that he was a specialist in the treatment of certain diseases, namely, the disease known as bloody piles; that he had never failed to effect a cure of said disease in cases treated by him; that said appellee was then affected with said disease, and said Doremus, knowing this to be true, represented to said appellee that he could and would cure him of said disease within a period of twelve months, and in case no cure was effected said Doremus expressly agreed to return to appellee all notes and money he (Doremus) had received from appellee; that said representations were false, were then known by Doremus to be false, and were made by him with the fraudulent purpose and intent of deceiving and defrauding appellee; that appellee relied upon said representations, believed them to be true, and was thereby induced to and did contract with Doremus for treatment under the terms aforesaid, and was induced to and did execute to Doremus the note sued on; that said representations were false; that said Doremus was not and never had been a regular practicing physician; that he had no knowledge of the practice of medicine, and had never effected a cure of said disease for any person, and could not and did not cure appellee, although appellee took said treatment prescribed by Doremus and according to instructions for the period of time required, as represented by Doremus; that appellant took the assignment of said note with full knowledge that said note was obtained by said payee under the false and fraudulent representations and circumstances as set out.

It is well established that where fraud or illegality in the

execution of a note is set up as a defense, the burden is upon the holder to show his right to protection from

4. such defense as a good-faith purchaser. *New v. Walker, supra*; *Giberson v. Jolley* (1889), 120 Ind. 301; *Harbison v. Bank of the State of Indiana* (1865), 28 Ind. 133, 92 Am. Dec. 308; *Ray v. Baker* (1905), 165 Ind. 74; *Roberts v. Lane, supra*; *Baldwin v. Fagan* (1882), 83 Ind. 447; *Zook v. Simonson* (1880), 72 Ind. 83. The case last cited is very much in point. The paragraph in question, exclusive of the averments that Doremus had no license to practice, was sufficient to constitute a defense to one with notice, and it is averred that appellant had notice. This, however, would not defeat recovery by appellant if he were able to show that Freeman, his indorser, was a good-faith holder, and that the defense could not be made against him. But since the defense was based on fraud in the inception of the note, the burden of showing the *bona fides* of Freeman was cast upon appellant, and if he desired to avail himself of this protection he should aver and prove it. But, aside

from the general averments of fraud, the plea shows

5. a good defense, since it avers specifically that the note was given for medical services rendered by a person who was not entitled to receive pay for such services. The statutes of this State make it a misdemeanor for any person to practice medicine without a license duly issued under the laws prescribed. §8410 Burns 1908, Acts 1897, p. 255, §9. This being true, the act of Doremus in treating appellee was an illegal act, and the receipt of the note for such services was a part of such illegal act. It is a settled rule of law that business transactions in violation of law, or which involve the commission of a crime or misdemeanor, cannot be made the foundation of a valid contract, and any contract so made is void and a recovery for services thereunder cannot be had. *Cooper v. Griffin* (1895), 13 Ind. App. 212; *Orr v. Meek* (1887), 111 Ind. 40.

The cases cited apply the rule to the right to recover for

services in the practice of medicine without a license. So, without reference to the other averments of the answer, the averment showing that the note was given as a part of an illegal contract was a sufficient answer to the complaint, and put the burden upon appellant to show his right to recover, notwithstanding the illegality in its execution. The principles we have announced in considering the questions upon the demurrers determine the material questions raised upon the instructions given, and we do not deem it necessary to reiterate them.

Appellee contends that since the complaint avers that appellant received the note by indorsement from Freeman, and the evidence shows that he received the note by indorsement from a person named Fermon, the note is the same as if it had not been indorsed, and is subject to the defenses that may be set up to a note transferred without indorsement. We do not pass upon this question, since the answer must meet the averments of the complaint to consti-

6. tute a defense, and we cannot look to the evidence to determine what the averments of the complaint are or should be.

Judgment reversed and cause remanded, with instructions to sustain the demurrer to the second and third paragraphs of answer and further proceedings not inconsistent with this opinion.

DOERING v. DAVENPORT.

[No. 6,765. Filed March 9, 1910.]

1. **APPEAL—Weighing Evidence.**—The Appellate Court cannot weigh conflicting oral evidence. p. 466.
2. **APPEAL—Affirmance.—Insufficient Evidence.**—A judgment sustained by some evidence upon every material point, will not be disturbed, on appeal, on the ground that it is not supported by the evidence. p. 467.

Doering v. Davenport—45 Ind. App. 465.

3. **SET-OFF AND COUNTERCLAIM.—Judgment.—Motion to Modify.**—A motion to modify a judgment by striking out defendant's judgment on his set-off on the ground that a judgment on a set-off cannot be rendered for a less amount than the judgment for the plaintiff, should be overruled. p. 468.

From Elkhart Circuit Court; *James S. Dodge*, Judge.

Suit by John H. Doering against William Davenport. From a decree entered, plaintiff appeals. *Affirmed.*

Oscar Jay, for appellant.

Frank W. Brown, for appellee.

MYERS, C. J.—Appellant sued appellee to enforce payment of a certain promissory note, to foreclose a chattel mortgage securing the payment of said note, and on an open account. The appellee answered by general denial and set-off. Reply in denial. The issues thus formed were submitted to the court for trial, resulting in a finding in favor of appellant in the sum of \$153.77, and foreclosure of the chattel mortgage, and in favor of appellee on his answer of set-off in the sum of \$143.25.

The errors assigned relate to the overruling of appellant's motion for a new trial, and the overruling of his motion to modify the judgment.

Appellant, in support of his motion for a new trial, insists that the decision of the court was not sustained by sufficient evidence and was contrary to law. This in-

1. sistence is tendered only to the decision of the court on the issue presented by the answer of set-off. Upon that phase of the case we are asked to weigh the evidence, on the theory that this is a case of exclusively equitable jurisdiction. As affecting the issue presented by the answer of set-off, ten witnesses were before the trial court and testified. The evidence was all oral; therefore, guided by the settled law of this State, we are prohibited from weighing evidence in any case not within the rule announced in the case of *Hudelson v. Hudelson* (1905), 164 Ind. 694, authorizing an appellate tribunal to disturb the decision of a trial court

"only when the evidence upon the controlling issue is documentary, by depositions, or otherwise of such a clear and conclusive character as to enable and to warrant this court to say, as a matter of law, that such decision is erroneous." See, also, *Ray v. Baker* (1905), 165 Ind. 74; *Tinkle v. Wallace* (1906), 167 Ind. 382; *Smith v. Smith* (1905), 35 Ind. App. 610; *Hobbs v. Town of Eaton* (1906), 38 Ind. App. 628; *Tyler v. Davis* (1906), 37 Ind. App. 557; *Liebole v. Traster* (1908), 41 Ind. App. 278; *Wise v. Wise* (1909), 43 Ind. App. 625.

It is only when there is no evidence to support an essential fact, without which the judgment cannot stand, that this court will interfere with the decision of the trial
2. court. *Roberts v. Koss* (1904), 32 Ind. App. 510; *Republic Iron & Steel Co. v. Berkes* (1904), 162 Ind. 517; *First Nat. Bank v. Beach* (1904), 34 Ind. App. 80; *White v. Redenbaugh* (1908), 41 Ind. App. 580. In the case of *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, it is held that "the fact that the evidence in the case on some particular and material issue appears to be weak or unsatisfactory is not alone sufficient to warrant this court in disturbing the judgment."

We have carefully read and considered all of the evidence presented by the record before us, and we cannot say that there was no evidence authorizing the trial court to draw inferences of fact fully sustaining its decision and judgment on the paragraph of set-off, and such decision, being within the issues supported by the evidence, was not contrary to law. *Smith v. Smith, supra*.

Appellant, in support of his motion for a new trial, also insists that the court erred in the assessment of appellee's recovery, it being too large. In support of this latter assignment it is argued that the evidence does not warrant an assessment of damages as made by the court. In this we cannot agree with appellant, for it is clear that if the appellee is entitled to anything on his answer of set-off he is

entitled, under the evidence, to the amount found by the trial court.

Appellant's motion to modify the judgment "by rejecting, striking out and annulling all that part of the decree that awards judgment in favor of defendant against

3. plaintiff on the set-off" was overruled, to which ruling appellant excepted, and this ruling is assigned as error. Against this ruling it is argued that inasmuch as the sum due on defendant's set-off does not exceed the amount due plaintiff, a judgment in favor of defendant for a less amount is not authorized by statute. §597 Burns 1908, §571 R. S. 1881. In this appellant is in error. The statute referred to provides: "If a set-off established at the trial exceed the plaintiff's claim so established, judgment shall be rendered for the excess; or if it appear that defendant is entitled to any other affirmative relief, judgment shall be given therefor." This statute not only authorizes a judgment for the amount found to be due on a set-off in excess of plaintiff's claim, but for a less amount as well.

In this case the amount found to be due to plaintiff exceeds the amount found to be due to defendant. The sum due to defendant was properly set off against said sum due to plaintiff and the judgment was correctly rendered in accordance with these findings. Our attention has not been called to any error for which the judgment of the trial court should be reversed.

Judgment affirmed.

Boyce v. Royal Stove, etc., Co.—45 Ind. App. 469.

BOYCE ET AL. v. ROYAL STOVE AND RANGE
COMPANY.

[No. 6,709. Filed March 9, 1910.]

1. **CONTRACTS.**—*Uncertain.*—*Assumption of Payment of Debts.*—*Sales.*—*Maxims.*—A contract stipulating that the purchaser of a stock of goods assumes and agrees "to pay the outstanding bills for said place," is not void for uncertainty, the maxim, "That is certain which can be rendered certain" applying thereto. p. 469.
2. **CONTRACTS.**—*Consideration.*—*Preamble.*—*Sales.*—A contract reciting in its introduction that "Whereas it is the desire of said [vendor] to exchange his equity in a stock of goods and store to said [vendees] for said two respective pieces of real estate," and further providing that the vendees shall pay the outstanding debts due for such goods, does not show that the provision for the assumption of the debts is void for the want of a consideration. p. 470.
3. **CONTRACTS.**—*Assumption of Payment of Debts.*—*Judgment.*—The purchasers of a stock of goods, assuming and agreeing to pay the debts due from the owner thereof, cannot be held liable where, in an action against such owner and such purchasers for one of such debts the judgment was in favor of such owner and against such purchasers. p. 471.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by the Royal Stove and Range Company against William A. Boyce and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

W. A. Thompson and *W. H. Thompson*, for appellants.

O. R. Krickenberger, for appellee.

ROBY, J.—Appellants exchanged certain real estate for a stock of hardware owned by one Frazier. A written contract was made specifying the terms of the
1. transaction, a stipulation thereof being as follows:

"Said Boyce and Louk assuming and agreeing to pay the outstanding bills for said place."

Appellee was a creditor of Frazier to the amount of \$485 for goods sold to him, which constituted a part of the stock

exchanged as aforesaid. This suit was brought by appellee against Frazier and appellants to recover the amount so due. The issue formed by various further pleadings was submitted to a jury, a verdict returned against appellants and for Frazier, and judgment was rendered accordingly. The first point made for reversal is that the stipulation before set out is too indefinite and uncertain to entitle a third party to avail himself of it as a promise for his benefit. A review of the cases from other jurisdictions, cited to sustain this point, would not be useful. The rule here has recently been restated. *Ochs v. M. J. Carnahan Co.* (1908), 42 Ind. App. 157; *Scott v. LaFayette Gas Co.* (1908), 42 Ind. App. 614. The promise to pay on the part of appellants is clear and explicit. The maxim "That is certain which can be rendered certain," applies, and under the averments of the complaint it was competent for the jury to find as it did. *Ochs v. M. J. Carnahan Co.*, *supra*; *Cold Blast Trans. Co. v. Kansas City Bolt, etc., Co.* (1902), 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

The contract referred to, after reciting that the appellants desired to exchange their real estate for

2. the stock belonging to said Frazier, proceeds as follows:

"Whereas it is the desire of said Frazier to exchange his equity in a stock of goods and store to said Boyce and Louk for said two respective pieces of real estate," etc.

It is urged that it is thereby shown that there was no consideration for appellants' promise to pay outstanding bills; that the lands were the consideration for the stock and the stock the consideration for the lands. The language quoted is introductory, and in a general way expresses the purpose of the respective parties, but specific mutual promises contained in the contract cannot be said to be without consideration because of their not having been detailed in this portion of the instrument.

Todd v. Mills—45 Ind. App. 471.

The difficulty with the judgment is that one fact necessary to recovery is that there should be a debt from Frazier to appellee. Unless such debt exists there is nothing

3. upon which the contract of assumption can operate.

The verdict of the jury and the judgment of the court establishes the fact that there is no such debt. It is not a question of suretyship, but one of making out a case. The verdict against appellants was therefore contrary to law.

Judgment reversed and cause remanded, with instructions to sustain the motion for a new trial.

TODD ET AL. v. MILLS.

[No. 6,712. Filed March 9, 1910.]

1. **JURY.—Verdict.—Equitable and Legal Issues.—Set-Off.**—Where a case involving both legal and equitable issues is submitted without objection to the jury for trial, the verdict is binding upon all parties until properly set aside, and the judge has no right to adjudge that a right of set-off exists, where the verdict is silent thereon. p. 473.
2. **APPEAL.—Reversal.—Parties.**—The Appellate Court, where justice requires, may reverse a judgment as to all parties, though some are not requesting such reversal. p. 474.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Suit by Walter G. Todd against Timothy L. Mills, George M. Todd being impleaded. From the judgment, plaintiff and another appeal. *Reversed.*

J. B. Kenner and *Sumner Kenner*, for appellants.

T. G. Smith and *C. W. Watkins*, for appellee.

RABB, P. J.—Appellee executed a note, secured by mortgage on chattel property, to appellant George M. Todd. This note, after its maturity, was duly assigned, by indorsement, by the payee to appellant Walter G. Todd, who brought this suit in the court below against appellee to recover on the note and to foreclose the mortgage. Appellee

appeared and filed his petition therein, praying that appellant George M. Todd be made a party defendant, and over appellant Walter G. Todd's objection, the prayer of the petition was granted, and George M. Todd was made a party defendant and brought into court by a summons duly issued. Appellee then filed his answer to the complaint in three paragraphs: (1) A general denial; (2) payment; (3) by way of set-off, setting up an indebtedness alleged to be due and owing to appellee from the payee of the note at the time the same was assigned to appellant Walter G. Todd. Said appellant's demurrer to the second and third paragraphs of answer was overruled, and a reply in denial filed to said affirmative paragraphs of answer. Appellee then filed what he denominates a cross-complaint, addressed solely to appellant George M. Todd, which cross-complaint sets up an account alleged to be due and owing to appellee from said George M. Todd, consisting apparently of the same items of indebtedness that appear in appellee's set-off filed in his answer to the complaint. No motion to strike this pleading from the files was made or exception of any kind was taken to it by appellant Walter G. Todd. Appellant George M. Todd filed his demurrer to this cross-complaint for want of facts, which, being overruled, he answered by general denial. All of the issues thus formed were, without objection or exception of any kind by any of the parties thereto, submitted to a jury for trial, precisely as though all of the issues in the case were properly triable by jury.

The jury returned two verdicts, one reading as follows. after giving the title of the cause: "We, the jury in the above-entitled cause, find for plaintiff Walter G. Todd, as against defendant Timothy L. Mills, and assess plaintiff's damages and recovery in the sum of \$146.83;" the other reading: "We, the jury in the above-entitled cause, find for defendant Timothy L. Mills. on his cross-complaint, as against the coplaintiff George M. Todd, and we assess de-

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fendant's damages and recovery in the sum of \$164.75." Without objection from any one, both verdicts were received by the court, and the jury discharged. It thus appears that the issues in two separate and distinct causes of action between different parties were, at the same time, submitted to the jury for trial and determination, and that, as the necessities of the case required, it rendered two separate and distinct verdicts: one in favor of plaintiff, determining all of the issues made on the complaint, the defendant's answer of general denial, payment and set-off, and the reply thereto of appellant Walter G. Todd, and one in favor of appellee, against appellant George M. Todd, determining all the issues made on appellee's cross-complaint against George M. Todd, and his answer thereto.

Upon the motion of appellee for a judgment in his favor on the verdict of the jury, the court, over the objection and exception of appellant Walter G. Todd, made and entered the following order: "The court finds in favor of plaintiff against defendant Mills on the note and mortgage sued upon, in the sum of \$146.83; and the court also finds in favor of defendant Mills, as against George M. Todd, the assignor of Walter G. Todd, on the note and mortgage sued on, in the sum of \$146.83, and that this sum should be set off against the sum found due plaintiff, and the court finds in favor of defendant Mills, against George Todd, the overplus of \$17.92. * * * It is therefore ordered, adjudged and decreed by the court that the judgment in favor of plaintiff, and the judgment in favor of Mills as against George M. Todd, the assignor of Walter G. Todd, in the sum of \$146.83, be set off against each other."

This action of the court, it is insisted by appellee, can properly be upheld, on the ground that plaintiff's suit, being

one to foreclose a chattel mortgage, and of equitable
1. cognizance, the verdicts returned by the jury are to be treated as merely advisory, and the court had the right to ignore the verdict, and make a finding upon the

issue, and that this was the course pursued by the court as indicated by the record. This position is not tenable: (1) The issues presented by the pleadings are not all of equitable cognizance. Some of them are and some of them are not. Those arising on appellee's answer of set-off, and on his complaint against appellant George M. Todd, are purely issues of law, properly triable by the jury; and all of the issues were, without question on the part of any one, submitted together for trial to the jury, precisely as though they were all of strictly legal cognizance. The parties took their chances to win or lose before the jury, and they cannot, after the verdict has been returned, question the right and authority of the jury to decide the questions thus submitted. The court and all the parties are bound by the submission thus made, and if the verdict were right, appellant Walter G. Todd was clearly entitled to a judgment thereon for the amount found in his favor against appellee. If, under the evidence, appellee was entitled to the set-off allowed him by the court against Walter G. Todd, then the verdict of the jury was wrong, because his right to such set-off was one of the issues submitted to the jury and determined against appellee, and appellee's right to the set-off was a question of fact, proper for the determination of the jury, not one of law for the court. The determination of the jury upon that question was conclusive upon all the parties until set aside on a proper order duly made by the court.

The order of the court making the set-off in question, as against appellant Walter G. Todd, was error, and requires the reversal of the judgment as to him, and, without

2. considering other questions raised by appellant George M. Todd, we think the interest of justice will best be subserved by a reversal of the judgment as to all parties.

Judgment reversed and a new trial ordered.

BAILEY, ADMINISTRATOR, v. MILLER ET AL.

[No. 7,305. Filed March 9, 1910.]

1. WORDS AND PHRASES.—“*Guarantee*.”—The word “guarantee” ordinarily imports an undertaking by one person that another will perform some engagement, but may mean an assurance or an act of making certain. p. 470.
2. CONTRACTS.—*Sale of Patent Right*.—“*Guarantee*” of *Right*.—A contract in which the holder of a patent right for a state stipulates that he will “guarantee to [the purchaser of a county right] peaceable possession of the rights to said patents and inventions in said * * * county, and all the expenses which may be incurred for suits or infringements or for ousting or keeping out present contractors within said territory.” constitutes an undertaking to give possession of such rights and to pay expenses incurred, but not to give possession for such county; and such vendor is not liable for sales made by another in such county unless the vendee has incurred expenses because thereof. pp. 476, 477.
3. WORDS AND PHRASES.—“*Right*.”—A “right” is a claim enforceable by law; and, as applied to property, imports the privilege of free use, enjoyment and disposal thereof. p. 477.

From Probate Court of Marion County (claim 8,894);
Frank B. Ross, Judge.

Action by Joseph Miller against Andrew J. Bailey, as administrator of the estate of Jehu Miller, deceased, and another. From a judgment for plaintiff, said administrator appeals. *Reversed*.

Newton M. Taylor, for appellant.

Holtzman & Coleman, for appellees.

ROBY, J.—Appellee Miller filed a claim against the estate of appellant’s decedent, and had a verdict for \$400, upon which judgment was rendered.

The assignment of error based upon the overruling of appellant’s motion for a new trial best presents the questions upon which the case depends. Appellant’s decedent sold to the appellees the right to use a patent for the construction of a cement cistern. He was not the inventor, but had

purchased the patent for the State of Ohio, and sold it for Lucas county, executing a written assignment therefor. The instrument contained a clause as follows:

“I further guarantee to said Sylvester F. Wilson peaceable possession of the rights to said patents and inventions in said Lucas county, and all the expenses which may be incurred for suits or infringements or for ousting or keeping out present contractors within said territory.”

The basis of liability averred was that decedent and also appellant failed to give said assignee peaceable possession of said territory, and that a person named was, at the time of the assignment, using said patents in the county, and continued to use them thereafter. The damages assessed seem to have been estimated with relation to the profit on sixty cisterns put in by the decedent's son-in-law, the person before referred to, after assignment. Appellant insists that the contract heretofore set out is void on its face, for the reason that the word “guarantee,” in the connection

1. in which it is used, means nothing whatever. We are not able to agree with this insistence. The word has an established legal meaning, and ordinarily implies an undertaking by one person that another will perform some engagement. 4 Words and Phrases, 3179. It was not used in this sense in the instrument under consideration as the context shows. It by no means follows that it is meaningless. A guaranty is any thing that assures or makes certain. Thesaurus Dict., 946. The act of making certain. Standard Dict.

The word in this connection is an assurance of the validity of the assignment then made, and implies an undertaking to perform the things specified: (1) To deliver

2. peaceable possession of the right to said patents and inventions in Lucas county; (2) to pay all expenses which the assignee might incur in suits for infringements;

(3) to pay all expenses which might be incurred in ousting or keeping out present contractors within said territory. Decedent did not by this contract undertake to deliver peaceable possession of the territory named. The stipulation

is for peaceable possession of the rights to said

3. patents. A right is a claim or title to or interest in anything whatsoever that is enforceable by law. The word "rights," as applied to property in a contract, refers to the right to the free use, enjoyment and disposal of it. It also means the possession of the full and complete title, and of all remedies relating thereto. *Ammidown v. Granite Bank* (1864), 8 Allen (Mass.) 285; *Miller v. Trustees, etc.* (1846), 5 Smed. & M. (Miss.) 651; *Pratt v. Fountain* (1883), 73 Ga. 261; *Wallace v. Taliaferro* (1800), 2 Call (Va.) 447, 481. Whatever right the patentee might have was thereby assured to the purchaser within the limits

2. named. The possession of this right authorized the assignee to protect himself by suits for infringement, and in the event that such suits were brought the decedent became responsible for expenses incurred, as he did for other suits for ousting or keeping out present contractors. These last provisions are inconsistent with the claim that the decedent became liable under this contract for whatever profit might be made in Lucas county through infringements by others than himself. The recovery had, depends upon an unwarranted construction of an engagement none too clearly expressed, and the motion for a new trial should have been sustained.

Judgment reversed.

SOUTHERN RAILWAY COMPANY v. HAZLEWOOD.

[No. 6,779. Filed June 3, 1909. Rehearing denied December 8, 1909. Transfer denied March 9, 1910.]

1. RAILROADS.—*Negligence.—Complaint.—Common Count for Services of Surgeon Treating Injured Employe.—License.—*Railroad companies may employ surgeons to treat injured employes; and a common count for services rendered is sufficient in an action by a surgeon who performed such services, an averment that the plaintiff was licensed being unnecessary. pp. 480, 481.
2. RAILROADS.—*Claim Agents.—Ratification of Acts of.—Employment of Surgeons.—*A railroad claim agent, or "assistant law agent," having power to compromise claims, who authorized the employment of plaintiff to attend an injured employe, and whose settlement of such employe's case by the payment of a certain sum and by the agreement to pay the doctors' bills, was adopted and ratified, had authority to employ a physician, and the company is estopped to deny such authority. pp. 480, 482.
3. RAILROADS.—*Claim Agents.—Employment of Surgeons.—Authority.—*Whether a claim agent acts within the scope of his authority in employing a surgeon to attend an injured employe, is a question of evidence. p. 481.
4. CONTRACTS.—*Statute of Frauds.—Railroads.—Employment of Surgeon.—*A railroad company's contract of employment of a surgeon is not within the statute of frauds, because (1) it is the company's debt, and (2) if not the company's debt, it is a promise, founded upon a sufficient consideration, to pay another's debt, the original debtor not being discharged. p. 481.
5. RAILROADS.—*Claim Agents.—"Law Agents."—Authority.—Verdict.—Appeal.—*A verdict, founded upon some evidence, that a railroad company's "law agent" had authority to employ a surgeon to attend an injured employe, is conclusive on appeal. p. 483.

From Floyd Circuit Court; William C. Utz, Judge.

Action by Felix W. Hazlewood against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

A. P. Humphrey, E. P. Humphrey, J. D. Welman and C. L. & H. E. Jewett, for appellant.

Stotsenburg & Weathers, for appellee.

ROBY, P. J.—Suit by appellee, a physician, against appellant railway company, to recover the value of services rendered an employe injured in appellant's service. The complaint was in three paragraphs: (1) A common count for services rendered; (2) alleging that Orville Smith, a brakeman in appellant's service was injured while at work by being dragged from the top of a train, that he was placed in a hospital, and that appellant, by one of its agents or servants, employed appellee, a duly licensed physician, to treat Smith for his injuries; (3) alleging that appellant made a settlement with Smith for the damages he sustained, and agreed, as part of the consideration, to pay the bills of physicians who treated him. A separate demurrer to each paragraph as filed and overruled, and an answer in general denial was filed. The case was tried by a jury, which returned a verdict for appellee for \$196.

Errors relied upon are the overruling of appellant's demurrers to each paragraph of the complaint, and the overruling of its motion for a new trial. The demurrer to the third paragraph of complaint is as follows: "Defendant demurs to the third paragraph of plaintiff's complaint, and for cause of demurrer says: Said second paragraph of complaint does not state facts sufficient to constitute a cause of action against this defendant."

The evidence shows that during the night of March 14, 1906, Orville Smith, a brakeman, was injured while in appellant's service, and was taken to New Albany, where he was examined by appellant's regular surgeon, who at that time gave him no medical attention beyond prescribing a headache powder; that the next morning said Smith's father, a physician who lived at a distance, came to see him, and dismissed appellant's surgeon, whereupon appellee became the attending physician. T. M. McDonald, claim agent, or "assistant law agent," called on the injured employe the same morning. There is evidence that he told Smith to keep Doctor Hazlewood and the company would pay for his

services. Smith was later moved to a hospital, where, on at least two occasions, McDonald inquired how he was getting along, told him to let Doctor Hazlewood continue his treatment, and that the company would pay the bill. Doctor Hazlewood testified as follows:

“Q. What did he [McDonald] say in reference to your employment?

A. He said that Smith was dissatisfied with the company's doctor, and that he wanted me to go ahead and look after him, and that I should rest easy about the bill; that the company would as soon pay me as any other doctor, and for me to keep account of my bill and the company would pay it.

Q. You say that was within a week or ten days after you had been treating him?

A. Yes, sir.

Q. In pursuance to that, did you proceed to treat this man?

A. Yes, sir.”

Appellee ordered a spinal brace for Smith from a surgical instrument house in Louisville, and the bill was sent to appellant's general superintendent, and was paid. Smith testified that the settlement was made between himself and the company, by its agreeing to give him \$5,300, and pay his hospital expenses and doctors' bills.

The first paragraph of the complaint was the common count “for services rendered at the special instance

1. and request of defendant.” Railroad companies may employ surgeons generally, and therefore the paragraph was sufficient.

Appellant urges that the claim agent had no authority to employ a physician. He had authority to compromise the claim against it and to minimize damages recover-

2. able from it. The settlement which he made has been adopted. The employment of a competent surgeon might be one step in minimizing such damages and in pro-

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curing such settlement. It was therefore germane to the employment. Appellant, having held him out as possessing authority, is now estopped from denying it. *Cruzan v. Smith* (1872), 41 Ind. 288. The case of *Louisville, etc., R. Co. v. Smith* (1889), 121 Ind. 353, 6 L. R. A. 320, strongly relied on by appellant, is not in point. The authority of a conductor and of a claim agent rests on different bases. The natures of the two employments are essentially different. It was the duty of the "assistant law agent" to visit injured persons and to settle or compromise with them. The

employment of a physician is reasonably incidental

3. to these duties, and whether said agent acted within the scope of his authority, was a matter of proof. *Bedford Belt R. Co. v. McDonald* (1897), 17 Ind. App. 492, 60 Am. St. 172; *Terre Haute, etc., R. Co. v. Stockwell* (1889), 118 Ind. 98.

The promise of the railroad company to pay appellee is not within the statute of frauds, for two reasons: (1) The

debt is the debt of the company. (2) Where a

4. promise is made to a debtor to pay his debt to a third person, and sufficient consideration has passed between the debtor and promisor, an action may be maintained without the discharge of the original debtor. *McDill v. Gunn* (1873), 43 Ind. 315; *Hyatt v. Bonham* (1898), 19 Ind. App. 256.

Judgment affirmed.

ON PETITION FOR REHEARING.

ROBY, J.—Appellant renews its attack upon the sufficiency of the first paragraph of complaint, citing the case of *Bedford Belt R. Co. v. McDonald* (1895), 12 Ind. App.

1. 620, in which it was held that a physician must aver that he had, prior to the rendition of services sued for, procured a statutory license. The point made by appellant is not supported by the opinion, as we read it. If the opin-

ion were construed as holding that the common count is not good against a railway company in an action of this sort, its correction as to such expression would be required.

"In every species of the common count, the averments, by means of certain prescribed formulas, presented what the pleader conceived to be the legal effect and operation of the facts instead of the facts themselves. * * * The circumstances under which one person could be liable to another for money had and received were very numerous. * * * The mere averment that the defendant was indebted for money had and received admitted any of these circumstances in its support, but it did not disclose nor even suggest the real nature of the liability." Pomeroy. Code Remedies (4th ed.), §438. Logically, as shown by Mr. Pomeroy in the section just cited, the common count does not meet the requirement of the code—that facts be stated in plain and concise language; but the decisions in this State, as in most other states, establish the sufficiency of the common count as a complaint. *Fort Wayne, etc., R. Co. v. McDonald* (1874), 48 Ind. 241; *Curran v. Curran* (1872), 40 Ind. 473, 477; Pomeroy, Code Remedies (4th ed.), §436. The matter is purely one of pleading. Plaintiff cannot recover except upon proof that the request or contract he relies upon was made by a competent person. Had he chosen to plead the facts, instead of the conclusion that defendant is indebted, etc., then much that counsel say would be correct, but so long as there may, under some state of facts, be liability, the presumption is that such possible facts are relied upon.

It is said in the brief that the court had "no right to designate" Mr. McDonald "as claim agent." The term has

a well-understood meaning, and while the person
2. named testified that he was "law agent for the Southern," he also testified to facts which show his business to have been the adjustment of claims, as was also shown by other testimony, so that the term "law agent," meaningless

in itself, does not seem so appropriate as "claim agent," which latter term was used in the instructions and otherwise during the trial. The real question, however, is not

5. one of name, but of substance. The verdict carries with it at this stage a finding for appellee upon the question of McDonald's authority, and such finding is supported by evidence.

The petition for rehearing is overruled.

ACKERMAN v. HAWKINS ET AL.

[No. 6,942. Filed June 3, 1909. Rehearing denied October 14, 1909. Transfer denied March 9, 1910.]

1. **FRAUD.—Deeds.—Infants.—Misrepresentations as to Age.—Husband and Wife.**—A deed executed by a married woman having the appearance of being, and believed by the grantees to be, more than twenty-one years old, and two subsequent deeds executed by such woman to confirm such former deed, expressly showing that she was twenty-one years old, constitute a fraud upon the grantees, such woman having received and failed to return the consideration received (§§3979, 3980 Burns 1908, §§2944, 2945 R. S. 1881). pp. 490, 494.
2. **DEEDS.—Consideration.—Married Woman.**—A deed executed by a married woman in consideration of lands conveyed, at her request, to her husband and her father-in-law, upon an agreement by them subsequently to convey certain of such lands to her, is supported by a consideration moving to her. p. 493.
3. **MORTGAGES.—Infant Grantors.**—A mortgage executed by an infant married woman's grantee, ignorant of her age and believing her to be twenty-one years old, and which grantee received two subsequent ratifying deeds upon an express representation that the grantor was twenty-one years old, is valid and binding, there having been no return of the consideration to such grantee. p. 494.

From Superior Court of Madison County; *Ulric Z. Wiley*, Special Judge.

Suit by Daisy Z. Ackerman against Etta E. Hawkins and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

A. H. Jones, for appellant.

M. M. Bachelder, Ellis & Call and *Thomas B. Orr*, for appellees.

WATSON, J.—This suit was brought by appellant to set aside two deeds made and executed by appellant and her husband to William H. and Etta E. Hawkins, to set aside a mortgage executed on the real estate by said Hawkins and wife to the Anderson Trust Company, to have the title to said real estate quieted in appellant, and to recover a reasonable rental value of the land during the time appellee Hawkins has been in possession thereof. Judgment on the findings and conclusions of law in favor of appellees.

Appellant has assigned a number of errors, but in the determination of this case it is only necessary to consider the errors assigned in overruling appellant's motion for new trial, viz.: The decision of the court (1) is not sustained by sufficient evidence, and (2) is contrary to law. These assignments call in question the court's rulings upon the two controlling issues in this case: (1) Fraud, and (2) consideration.

The court, among other facts, found the following: "(1) That on October 13, 1902, Daisy Ackerman, plaintiff herein, was a *feme covert*, under the age of twenty-one years; that her husband, John Ackerman, was at the time over the age of twenty-one years." "(5) That on the date mentioned in finding No. 1, herein, plaintiff was the mother of two children. She was above the average height for a woman, and weighed about 200 pounds, and in all respects looked to be over twenty-one years of age, and had had such appearance for two years prior thereto. (6) That prior to October 13, 1902, the plaintiff had secured a conveyance to herself of certain real estate in Madison county, Indiana, which is not

involved in this controversy, which she afterwards conveyed, her husband, John Ackerman, joining her in such conveyance; that she did not purchase said real estate herself, or negotiate for such purchase, but that her father-in-law, Valentine Ackerman, purchased the land and had it conveyed to her, and the court finds that she never had any pecuniary interest in the real estate so purchased by Valentine Ackerman and conveyed to her, and which she afterwards conveyed to a third person; that said two conveyances were duly recorded in the recorder's office of Madison county. (7) That prior to October 13, 1902, plaintiff had borrowed money, secured the payment thereof by a mortgage on her real estate, and afterwards paid off said mortgage; that before said date she had entered into contracts, receipted for money, and received it from the administrator of her mother's estate, and had dealt, in a general way, with different persons as if she were over the age of twenty-one years; that, so far as the evidence shows, prior to said date she had not claimed to anyone that she was under the age of twenty-one years; that she knew herself that she had not yet attained her majority, and she knew that those with whom she had been dealing believed her to be over the age of twenty-one years." "(12) That, pursuant to said negotiations and said written agreement, as before set out in finding No. 9, said William H. Hawkins, Valentine Ackerman and J. B. Kinney met in the town of Frankton, on October 13, 1902, for the purpose of exchanging deeds to said real estate; that on said day William H. Hawkins, for the first time, was informed that the forty-eight acres of land in controversy, and which was mentioned in said contract, was owned by plaintiff, and that thereupon he demanded that she and her husband join in a deed to said real estate; that said John Ackerman went to his home from Frankton, where said parties had met to exchange said deeds, brought his wife to town, and she and her said husband then and there executed and delivered to William H. Hawkins and Etta E.

Hawkins, his wife, a deed of general warranty, conveying to them the land in controversy, which is as follows." "(14) At the same time said William H. Hawkins executed and delivered to Valentine Ackerman and his son, in accordance with the terms of said written agreement aforesaid, a deed of general warranty, conveying to said Valentine Ackerman and his son the several tracts of land in Mississippi, which are specifically described in the contract between said Ackerman and son and William H. Hawkins, as appears in finding No. 9." "(16) That after the execution and exchange of said deeds, and after the recordation of the deed from plaintiff and her husband to Hawkins and Hawkins, said William H. Hawkins obtained information that there was some question as to whether the plaintiff, at the time she executed said deed, was twenty-one years of age; that he immediately made an investigation as to her age, and sent to the town of Frankton and informed Valentine Ackerman that he had heard that some people were claiming that plaintiff was not of age at the time she executed said deed, and stated to Valentine Ackerman that he wanted a good deed; that they had his property and he had theirs, and that if he could not get a good deed he wanted to return the property and have his returned to him. He was informed by said Valentine Ackerman that the plaintiff was of age at the time of the execution of said deed, but if there was any doubt about it she would be of age on December 28, 1902; that, relying upon said representations, defendant Hawkins had another deed prepared and forwarded to J. M. Farlow, a notary public at the town of Frankton, Indiana, for the purpose of having said plaintiff and her husband execute an additional deed after December 28, 1902, which said deed is in the words and figures following." "(21) The court further finds that plaintiff knew that the grantees named by William H. Hawkins in the deed to the Mississippi land were Valentine Ackerman and son; that Valentine Ackerman was plaintiff's father-in-law, and that the word 'son,' representing

one of the grantees in said deed, meant plaintiff's husband, John Ackerman." "(24) The court further finds that on October 13, 1902, when William H. Hawkins deeded to Valentine Ackerman and son the Mississippi land, and when plaintiff and her husband conveyed to William H. Hawkins the land in controversy, both of said deeds, before they were executed, were read over in the presence and hearing of plaintiff, and that she knew that the Mississippi land was conveyed to Valentine Ackerman and her husband, and she did not at the time make any complaint thereof, but, on the contrary, assented thereto. (25) The court further finds that when said deed for the Mississippi land was executed to Valentine Ackerman and son there was an agreement and understanding between Valentine Ackerman, Daisy Ackerman, and her husband, John Ackerman, that, when they went to Mississippi to take possession of the land, a sufficient number of acres of said Mississippi land should be conveyed to plaintiff, which should equal in value the real estate she had conveyed to Hawkins and Hawkins, and that she should have said land conveyed to her as a consideration for the real estate which she had conveyed to Hawkins and Hawkins in exchange for the Mississippi land; that by such agreement and understanding the plaintiff was to have conveyed to her 400 acres of the Mississippi land upon which there was situate a white dwelling-house. (25½) The court further finds that the 400 acres of land in Mississippi, which it was agreed should be conveyed to plaintiff on the arrival of the two families there, was equal, or approximately equal, to the land which plaintiff conveyed to Hawkins and Hawkins. (26) The court further finds that, within a few days after the execution of the third deed by plaintiff and her husband to William H. Hawkins, Valentine Ackerman and wife and plaintiff and her husband removed to the State of Mississippi for the purpose of taking possession of the real estate which had been conveyed to Valentine Ackerman and son; that they took their household goods, and took posses-

sion of said real estate. (27) The court further finds that within a short time after their arrival in the State of Mississippi, and while living on said land, plaintiff demanded of Valentine Ackerman and her husband, John Ackerman, that they set off to her her portion of said real estate, being 400 acres, in consideration of her having deeded the land in controversy as a part of the consideration for the exchange of said Mississippi land, and that thereupon such demand and request were refused by said Valentine Ackerman; that he, at that time, informed plaintiff that there was no real estate there for her; that plaintiff took no legal or equitable action in reference to said real estate for the purpose of securing whatever right she had therein, but when said Valentine Ackerman refused to convey to her any portion thereof she returned to Indiana; that shortly thereafter her husband, John Ackerman, and Valentine Ackerman executed to Ann M. Ackerman, the wife of Valentine Ackerman, a deed of general warranty, conveying to said Ann M. Ackerman all of said real estate in Mississippi; that at said time John Ackerman was indebted to Ann M. Ackerman in the sum of \$600, which indebtedness, by agreement between John Ackerman and Ann M. Ackerman, was canceled by conveyance of said real estate to her. (27½) The court further finds that John Ackerman had no interest, either legal or equitable, in said Mississippi land."

"(29.) The court further finds that plaintiff, together with her husband and Ann M. Ackerman, her mother-in-law, executed to the Anderson Loan Association a mortgage on the real estate referred to in finding No. 6, to secure the payment of \$1,200, which mortgage was executed on October 23, 1900; that on September 18, 1902, her husband joining her, plaintiff executed another mortgage to Ann M. Ackerman to secure the payment of \$600 on said last-mentioned tract of land, and that both of said mortgages had, prior to October 13, 1902, been released of record and satisfied, all of which

fully appeared upon the records of Madison county, Indiana.”

“(35) The court further finds that soon after the conveyance of the real estate in controversy to William H. Hawkins and Etta E. Hawkins they took possession thereof and have held continuous possession up to the present time, and that the rental value of said real estate is and has been \$175 per annum. (36) The court further finds that, since the execution of the several deeds hereinbefore found, plaintiff has lived peaceably and happily with her husband John Ackerman, and that during all said time she has been on friendly terms with and visited the family of Valentine Ackerman. (37) The court further finds that on October 13, 1902, when the plaintiff executed the first deed to said real estate, on December 29, 1902, when she executed the second deed, and on December 31, 1902, when she executed the third deed, she knew that she was not twenty-one years old. (38) The court further finds that on December 29, 1902, when the plaintiff executed the second deed, which contained the following statement: ‘This deed is executed for the purpose of confirming and ratifying a deed executed by the grantors herein to the grantees herein on October 13, 1902, the grantor herein, Daisy Ackerman, being at the time of the execution of said former deed a minor under the age of twenty-one years, and she being now over twenty-one years of age,’ she fully understood the meaning and purport of said statement, and made it for the purpose of misleading and defrauding said Hawkins and Hawkins; that said statement in said deed was false and fraudulent, and constituted a fraud upon them. (39) The court further finds that said Hawkins and Hawkins believed said statement and relied upon it, and if plaintiff had not executed a second deed, and subsequently a third deed, after she had made said statement, they would not have accepted said conveyance, and would have proceeded at law to recover the real estate in Mississippi

which they had conveyed to Valentine Ackerman and his son with the knowledge and consent of plaintiff, in consideration of the conveyance to them of the real estate owned by Valentine Ackerman and that owned by the plaintiff, the latter being the land in controversy. (40) The court further finds, from the facts herein stated, that plaintiff fully knew and understood that the deed to the Mississippi land was made to Valentine Ackerman and son, and that she was to have an interest in said land equal to the value of the real estate in controversy, which was a part of the consideration for the exchange of said lands between said parties, and that she did, in fact, receive such consideration."

The special findings show that the plaintiff was a *feme covert*, under the age of twenty-one years on October 13, 1902, the date of the execution of the first deed, on

1. December 29, 1902, the date of the execution of the second deed, and on December 31, 1902, the date of the execution of the third deed; that she knew she was not of age at the time she executed said deeds, for, upon her own testimony, she was born September 24, 1883; that she knew that Hawkins and Hawkins believed and were relying upon the assurance that she was twenty-one years old when the second and third deeds were executed: that the express purpose of these last two deeds was to ratify the first deed of October 13, 1902, which William H. Hawkins, upon inquiry, found was given before plaintiff was of age. The second deed expressly stated the purpose for which it was executed, to wit:

"This deed is executed for the purpose of confirming and ratifying a deed executed by the grantors to the grantees on October 13, 1902, the grantor Daisy Ackerman being at the time of the execution of said former deed a minor under the age of twenty-one years, and she being now over twenty-one years of age."

This deed was read to plaintiff, and, after being told by the notary that if she was twenty-one years old she should sign

it, but if not she should not sign it, she did sign it, knowing full well that the statement therein regarding her age was untrue.

The special findings disclose that John Ackerman and appellant were intermarried on April 23, 1899, and lived together as husband and wife, and were so living at the time of the commencement of this suit; that at the time the first deed was executed, to wit, October 12, 1902, John Ackerman, husband of appellant, was over twenty-one years of age; that appellant on January 12, 1905, disaffirmed said deed, and demanded that the real estate so conveyed by her and her husband be reconveyed to her, but she did not return or offer to return the consideration, or any part thereof, which she received for the real estate so conveyed by her and her husband, and which is the subject of this controversy. The execution of this last deed was a palpable fraud. Appellant signed it, knowing the purpose for which it was executed, and that appellee Hawkins was relying upon the untruth, recited therein, that she was twenty-one years of age. While the misapprehension on the part of said appellee, that she was to become of age on December 28, was due to a statement made to him by a third party, her own statement, that since executing the first deed she had become of age, as set out in the deed, in all respects confirmed it, and was either a participation in a fraud that had already been committed or was itself the perpetration of one.

All three of the deeds were delivered to Hawkins, but only the first and third were recorded. The second deed, although not one of the deeds sought to be set aside by this action, is a material link in the transaction, in that it contains a positive assertion by appellant that she had become twenty-one years of age. Hawkins believed this representation and relied upon it, and would not have accepted the conveyance had appellant refused to assent to that part in the deed pertaining to her age; neither would there have been a third

deed executed. Hawkins in no way took advantage of appellant. His dealings with her, although negotiated and transacted largely through her husband and father-in-law, were open and above suspicion. He acted throughout, as shown by the special findings and the evidence, in the utmost good faith and confidence, believing that he was being dealt with fairly and honestly. The evidence shows that prior to this transaction appellant had had dealings with various persons who, judging from her size and appearance, believed her to be twenty-one years of age. Sections 3979, 3980 Burns 1908, §§2944, 2945 R. S. 1881, are as follows: "§3979. In all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said land: Provided, however, that if she will allege in her complaint that she received no consideration for said sale, an issue may be made upon such allegation; and if, upon trial, the court or jury find that any consideration was received by her, the court shall, in the finding and decree, declare such amount so found first lien against said land in favor of the defendant. §3980. In all sales of real estate by an infant he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age."

In the case of *United States Sav., etc., Co. v. Harris* (1895), 142 Ind. 226, 240, a case under this statute, the court said: "It is very evident that the purpose of the act was to provide a remedy against the known evil arising out of the legal right of minors, who have actually reached the

estate of manhood and womanhood, to disaffirm their contracts in relation to their real estate, and at the same time retain the consideration received. It was not the purpose or intent to take away any of the protection that minority throws around infants of tender years. But it was the intent of the first section to take away some of the privileges the law of infancy throws around female minors, who are old enough to enter into and become bound by the most important civil contract that can be made by woman or man, and who have entered into such contract by marrying men over twenty-one years of age. The second section was evidently intended to take away some of the legal privileges from minors, both male and female, who have so nearly reached the estate of manhood and womanhood, that they might honestly be taken for persons of full age by those dealing with them, and who in dealing with such, concerning their real estate falsely represented themselves to be over twenty-one years of age. The general object of both sections, evidently, was to prevent minors of both classes from using the shield of minority as a sword, to prevent them from perpetrating deeds of rascality and villainy by means of their minority."

If it be true, as contended by appellant, that no consideration whatever was received by her, this is not a proper case for the application of the statute. William H. Haw-

2. kins conveyed to Valentine Ackerman and son 1,183 acres of land in the State of Mississippi, in lieu of the forty-eight acres owned by appellant and certain lots in the town of Frankton owned by Valentine Ackerman. Appellant knew that the deed was made to Valentine Ackerman and son, and assented thereto, understanding that the purpose of its being so made was that her portion of the land conveyed by said deed of Hawkins and wife might be partitioned between the parties after she and her husband had seen the land and decided which part would be most desirable.

The consideration moved from Hawkins to Valentine Ackerman and son, with an express agreement between the grantees and appellant as to the disposition thereof. Appellant, then, cannot be heard to say that no consideration was ever received by her. *Crawford v. Shaw* (1862), 18 Ind. 495; *Law v. Smith* (1904), 68 N. J. Eq. 81, 59 Atl. 327; *White Sewing Mach. Co. v. Fowler* (1904), 28 Nev. 94, 78 Pac. 1034; *First Nat. Bank v. Lang* (1905), 94 Minn. 261, 102 N. W. 700; *Chambers v. McLean* (1904), 24 Pa. Super. Ct. 567. Although at the time the deed from William H. and Etta E. Hawkins was executed, appellant gave no directions concerning whom it should name as grantees, the purpose and expediency of the deed were explained and subsequently acquiesced in by her as executed. The evidence does not sustain the allegation that appellant was coerced by her husband or anyone else into signing any of the three deeds, and the special findings so find.

The appellant earnestly insists that the special findings are not warranted by the evidence. We have examined the record and find that the evidence and the legitimate inferences to be drawn therefrom fully sustain every essential finding by the trial court upon which the conclusions of law are based.

The case properly comes within the statute before quoted. The appellant having failed to return, or offer to return, to appellee Hawkins the consideration so received for her

1. land, she will not be permitted to come into a court of equity and repudiate her contract, without doing equity, as provided by the statute.

It is shown that the Anderson Trust Company had no knowledge of appellant's age, but relied upon an examination of the records. What we have said as to the deed by

3. appellant to Hawkins and wife is equally applicable to the trust company's mortgage. The deed being valid and binding, it follows that the mortgage is also a valid lien on said real estate.

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The trial court correctly stated the conclusions of law upon the facts found. We find no error for which this cause should be reversed.

Judgment affirmed.

MYER, ADMINISTRATOR, v. MINCH ET AL.

[No. 6,411. Filed March 10, 1910.]

1. JUDGMENT.—*Jurisdiction.—Presumptions.—Mortgages.—Foreclosure.*—Where the parties to a foreclosure suit in the circuit court appear and answer, the decree entered cannot be attacked for want of jurisdiction, jurisdiction of the persons being shown by their appearances, and jurisdiction of the subject-matter being presumed. p. 497.
2. JUDGMENT.—*Court Proceedings.—Presumptions.*—The judgment, as well as other proceedings of a court, are presumed to be proper. p. 497.
3. JUDGMENT.—*Excessive.—Validity.*—An excessive decree, where jurisdiction exists, is not void. p. 497.
4. JUDGMENT.—*Review of.—Necessity of Showing Error.—Complaint.*—A complaint to review a decree, that fails to disclose any objection or exception to erroneous rulings therein, is not sufficient, such proceeding being in the nature of an appeal, the trial being by the record alone. p. 497.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Suit by Peter Myer, as administrator of the estate of Sarah Myer, deceased, against Joseph M. Minch and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Headington & Wheat, for appellant.

Smith & Moran, for appellees.

MYERS, C. J.—On April 26, 1906, appellant commenced this suit in the court below against the appellees, under §645 Burns 1908, §615 R. S. 1881, to review a decree foreclosing a mortgage in favor of George Hartnagle and against appellant's decedent and others, entered in the Jay Circuit Court on April 24, 1905. The complaint was in one paragraph, to which a demurrer for want of facts was sustained,

and a decree was entered in favor of appellees. The sustaining of appellees' demurrer to the complaint is assigned as error.

Appellant has incorporated in his complaint the complaint of Hartnagle to foreclose his mortgage, showing that Peter Myer, Sarah Myer, John Myer, Michael Myer, Joseph M. Minch and Jacob F. Myer, Jr., were made defendants therein. and that all of said defendants, except Sarah and Michael Myer, were lienholders on the land covered by the mortgage in suit. The amount of the lien held by each of said defendants, as well as the order of their priority, was alleged. It is also shown that each of said defendants answered the complaint in general denial. Sarah Myer, at that time a minor, answered in denial by a guardian *ad litem*. It is also shown that the issues thus formed were submitted to the Jay Circuit Court for trial, resulting in a finding fixing the amount and priority of the liens held by plaintiff and each of the defendants against a certain tract of real estate theretofore owned by Jacob Myer, who was then deceased, but who prior to his death had conveyed said real estate to Sarah Myer, who was found to be the fee-simple owner thereof. The mortgage lien of Hartnagle was found to be superior to all liens of defendants except one mortgage lien held by said Minch for \$1,121. The mortgage held by Hartnagle was foreclosed, the land ordered sold subject to the Minch lien for \$1,121. and the proceeds arising from such sale were ordered to be applied by the sheriff to the satisfaction, (1) of the costs of the suit, and (2) to the extinguishment of the Hartnagle lien, and to the extinguishment of the other liens in the order of their priority as found by the court. The residue, if any, was to be paid to the clerk of the court for Sarah Myer. It also appears that the Hartnagle suit was commenced April 5, 1905, decree thereon entered April 24, 1905, and on April 25, 1905, a copy of said decree was issued by the clerk of said court to the sheriff of said county, who thereafter, pursuant to said decree, sold said real estate to Dora A. Luttman, one

of the appellees herein, for the sum of \$1,675; that said sum was, by the sheriff, distributed as ordered in said decree; that the proceeds arising from said sale were insufficient to pay anything on the lien of Peter Myer or to Sarah Myer.

It is claimed by appellant that in the Hartnagle suit the court had no jurisdiction to try or to determine the question as to the amount or nature of any lien in favor of de-

1. fendants therein, for the reason that no issue was formed authorizing such adjudication. It cannot be said that the Jay Circuit Court did not have jurisdiction of the parties to that suit, nor that it was not a court of general jurisdiction, and, being a court of general jurisdiction, it is presumed to have jurisdiction of the subject-matter of the action. *Roberts v. Leutzke* (1907), 39 Ind. App. 577. For "by jurisdiction of the subject-matter is meant jurisdiction of the class of cases to which the particular case belongs." (*Chicago, etc., R. Co. v. Sutton* (1892), 130 Ind. 405. Therefore, having concluded that the Jay Circuit Court had
2. jurisdiction of the parties and of the subject-matter, it must be presumed that its acts and proceedings were regular, and that it had jurisdiction to enter the particular decree in question.

Returning to the allegations of the complaint, it clearly appears that appellant sought to review the decree entered in the Hartnagle suit, upon the theory that an error

3. of law was committed by the court in its finding and decree. If it be true, as claimed, that the decree gave one of the parties more than his pleading shows he was entitled to, such fact does not make the decree void. *Williams v. Manley* (1904), 33 Ind. App. 270, and cases cited. In the complaint before us it is not shown that any ob-
4. jection was made or exception reserved to any of the rulings of the court in the case wherein the decree was sought to be reviewed. This showing was necessary. The complaint was insufficient to withstand a demurrer for want

of facts. *Goar v. Cravens* (1877), 57 Ind. 365. As was said in the case of *Williams v. Manley*, *supra*: "A proceeding to review a judgment, for error of law appearing in the proceedings and judgment, is in the nature of an appeal, and is to be tried by the record alone. Such a proceeding cannot be sustained unless the error be such as would reverse the judgment on an appeal." In the case of *Wabash R. Co. v. Young* (1900), 154 Ind. 24, it was said: "It is therefore essential to a complaint for review of a judgment for error of law that it specifically sets forth the ruling of the court relied upon as error and the facts upon which such ruling is based (*Findlay v. Lewis* [1897], 148 Ind. 429), and that the plaintiff, at the time of such ruling, excepted thereto, *American Ins. Co. v. Gibson* [1885], 104 Ind. 336, and cases cited." In the case of *Murphy v. Branaman* (1901), 156 Ind. 77, it was held "that a proceeding to review a judgment is in the nature of an appeal, and that so much of the record in the case in which a review is sought must be set out in the complaint for review as will fully present the errors relied upon." In the case of *American Ins. Co. v. Gibson*, *supra*, it was said: "It has uniformly been held that if no objection be made to the judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be. This rule has been applied even where judgment was rendered by default." See, also, *Hague v. First Nat. Bank* (1903), 159 Ind. 636.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

CITY OF LOGANSPORT v. WEBSTER.

[No. 6,759. Filed March 10, 1910.]

1. MUNICIPAL CORPORATIONS.—*Alley Improvements.—Appeal.—Time for Taking.*—An appeal from the final order of a city council in fixing alley improvement assessments must be taken within twenty days (§3623e Burns 1901, Acts 1901, p. 534, §5). p. 501.
2. MUNICIPAL CORPORATIONS.—*Alley Improvements.—Appeal from Order for.—Complaint.—Construction.*—On an appeal from the action of a city council ordering the improvement of an alley, the transcript, on appeal, is treated as a complaint; but such complaint must be liberally construed. p. 501.
3. MUNICIPAL CORPORATIONS.—*Records.—Receipt of Bids for Alley Improvements.—Evidence.—Postponements.*—The law does not require that a record be made of the meeting of a city council, on the opening of bids for an alley improvement, or of its action in opening bids, such actions being provable by parol evidence. p. 502.
4. MUNICIPAL CORPORATIONS.—*Official Acts.—Presumptions.*—The acts of the common council of a city are presumed to be lawful. p. 502.
5. MUNICIPAL CORPORATIONS.—*Alley Improvements.—Bids.—Opening of.—Presumptions.*—Where the report of a street committee made on July 6 shows that bids had been received and opened, the presumption is that such bids were received and opened at the proper time, especially where no complaint had been made as to such improvement. p. 502.
6. MUNICIPAL CORPORATIONS.—*Alley Improvements.—Estoppel.*—Frontagers who stand by and permit alley improvements to be made, making no objections thereto until the work is completed, are estopped to take advantage of mere irregularities in order to avoid payment therefor. p. 504.
7. MUNICIPAL CORPORATIONS.—*Defective Alley Improvement Proceedings.—Burden of Proof.*—One objecting to the proceedings of a city council in receiving and opening bids for an alley improvement must show, in an appeal from the action of such council, that his substantial rights have been violated. p. 504.

From Cass Circuit Court; *John S. Lairy*, Judge.

Appeal by Weldon Webster from an order of the City of Logansport for the improvement of an alley. From a judgment for said Webster, the City of Logansport appeals. *Reversed.*

George W. Funk, for appellant.

Stewart T. McConnell, Albert G. Jenkins, Bertram C. Jenkins and Charles H. Stuart, for appellee.

HADLEY, J.—This is an appeal from the final assessment of benefits to improve an alley in the city of Logansport, under the act of the legislature of 1901, known as the Artman law. Acts 1901, p. 534, §§3623a-3623h Burns 1901.

The transcript of the proceedings of the common council, which forms the basis of the appeal, shows that on June 1, 1904, the common council of the city of Logansport, by more than a two-thirds vote, passed a declaratory resolution for the improvement of a certain alley in said city, and authorized the city clerk to advertise for bids to be received for said work up to 4 o'clock p. m., June 25. The clerk gave the prescribed notice, and on July 6, at a regular meeting of said council, the street committee of said council presented two bids for the work, together with their report thereon, as follows: "Your street committee, after opening and examining the bids for the improvement of the alley between Wright and Usher streets and Fifteenth and Sixteenth streets, would recommend that the contract for the improvement of said alley be awarded to Jerry Kerns, he being the lowest bidder, and we further recommend that the mayor and clerk enter into a contract, in accordance with the bid." The record then shows the adoption of the report, the acceptance of the bid of Jerry Kerns, and the execution of his contract for the construction of the improvement. The record also shows the completion of the work and its acceptance, and all further hearings, notices and proceedings, as required by said act to have been fully and legally had and performed. The final order of the common council, confirming and fixing the assessments, was made on November 21, 1904.

On December 21, 1904, appellee presented his bond for an appeal to the circuit court, which bond was approved. The

record does not show that appellee took any steps towards taking an appeal until said December 21.

The appeal was sought to be taken under section five of said act (§3623e, *supra*). This section authorizes an appeal within twenty days from the final order fixing the

1. assessments. It does not appear that the appeal was taken within that time, but no motion was made to dismiss the appeal below, and no question presented thereon here.

Upon the approval of the appeal bond the city clerk filed a transcript of the proceedings of the common council, as heretofore set out, in the office of the clerk of the Cass

2. circuit court. Appellee demurred to the transcript for want of facts, which demurrer was sustained, and judgment was rendered against the appellant. In cases of this character the transcript of the proceedings of the common council is treated as in the nature of a complaint. *Taber v. Ferguson* (1887), 109 Ind. 227; *Phillips v. Jolli-saint* (1893), 7 Ind. App. 458; *Reeves v. Grottendick* (1892), 131 Ind. 107. The only objection urged against the transcript is that it does not show that the bids were received within the time fixed in the notice, or that the council met at the time specified, to receive and open them. Section one of said act (§3623a, *supra*) provides that "the common council shall open the bids upon the date fixed and award the contract to the best bidder therefor: Provided, that such common council may take such bids under advisement and shall have the power to reject any and all bids."

In the very nature of things, the usual rules for the construction of complaints should not apply with strictness to cases like this. Here we have no one in interest filing a complaint. The real party whose interests are affected is the contractor, and yet the defect, if defect it is, accrued before the contract was let to him, and before he had any interest. Furthermore, only the recorded acts of the council are pre-

sented. The law does not require that a record be made of the meeting of the council at the opening of the bids, and if, in fact, it did meet at the time specified, and open the bids, and took them under advisement until finally acted upon, and no bids were received after that date, the mere fact that they made no record of such acts would not invalidate their subsequent proceedings. *Ross v. City of Madison* (1848), 1 Ind. 281; *School Town of Princeton v. Gebhart* (1878), 61 Ind. 187; *State, ex rel., v. Hauser* (1878), 63 Ind. 155. In the case last cited the court said on page 182: "The paragraphs of answer were not objectionable by reason of the fact that copies of the proceedings and actions of the common council, therein referred to, were not filed therewith as exhibits. The minutes of the common council are only evidence of their proceedings and actions; but if no minutes or record of the acts of the common council have been kept, these facts may be proved by parol evidence, like any other facts. The old doctrine, that the acts of a corporation could be proved only by the record of its proceedings, has ceased to be the law; and the rule is now, that the authorized acts of a corporation are not void, merely because there is no written evidence of them, and in such case their existence may be shown by parol evidence."

The common council is a public statutory board, and

4. the law presumes that it did its duty, and acted in conformity with the statutory provisions.

The report of the street committee, made to the council on July 6, shows that the bids had been opened at a former date and had been under investigation and advisement:

5. and, under the circumstances of this case, we will presume that the bids were properly received and opened. Especially is this true where it does not appear that the substantial rights of the party complaining have been affected. It is proper for us to consider, in this connection, the fact that no complaint is made that the work was not properly done; that the cost was in excess of the benefits to

adjoining property; that the benefits assessed are in excess of the benefits received, or that appellee did not have full notice of the contemplated work from its inception, during its progress, or up to its final completion, and there is no showing that he made any objection or protest thereto until after the work was finally completed, and the assessment fixed. *Taber v. Ferguson, supra.*

The rules by which we should be governed in such cases are plainly stated in the case of *Reeves v. Grottendick, supra*, where a proceeding, substantially the same as we now have before us, was under consideration, and in that case the court said: "Our statute provides that the transcript certified to the circuit court by the city clerk shall constitute the complaint of the contractor. This singular provision makes a pleading for a contractor who expends time, money and labor, in improving streets for the benefit of the municipality and private property owners, and justice requires that it should not be construed with rigid strictness against him. As the officers of the law, and not the party, make the pleading, it ought to stand, unless there is some defect in it which affects the substantial rights of the parties. It is by no means every departure from the statute that will warrant the courts in declaring that the contractor has no complaint. If, therefore, we find no error or defect in the proceedings and transcript before us affecting the substantial rights of the appellants, we must uphold the complaint."

In the case of *Sims v. Hines* (1892), 121 Ind. 534, in passing upon proceedings authorized by the same statute as in the case last cited, the court said: "The statutory provision is a singular one. inasmuch as it makes the transcript of the proceedings of the city authorities the complaint of the plaintiff, although, in fact, he has nothing to do with the proceedings, for they are conducted by the representatives of the municipality. The property owner really assails the proceedings of those who are his chosen representatives, and not the acts of contractor, when he demurs to the tran-

script, and it would seem that, in strict right, he should not profit by errors committed prior to the time the contractor acquires a special interest in the matter. * * * It is, at all events, nothing more than justice to require a property owner, who opposes the proceedings, to make known his objections before the contractor is fastened by his contract; and it is but fair to the contractor to relieve him from accountability for what occurs prior to the time he acquires a special interest in the proceedings. This right is fully open to the property owner, and the fault is his own if he does not avail himself of it."

The statute under discussion in the quotations just given contained a provision denying the property owner's right to question the proceedings had prior to the making of

6. the contract; and while the statute involved in the case at bar has no such provision, yet the reasoning of those two cases, and the general principles therein laid down, apply with force to this case.

For the foregoing reasons, we hold that the proceedings of the common council were sufficient to put appellee to the proof of his charges, and to show that he had suffered

7. in his substantial rights, if his appeal has been properly taken and he has not waived his rights by standing by.

Judgment reversed, with instructions to overrule the demurrer of appellee, and for further proceedings not inconsistent with this opinion.

GRIFFITH ET AL. v. SPROWL ET AL.

[No. 6,710. Filed March 10, 1910.]

1. **CORPORATIONS.—Capital Stock.—Subscriptions.—Telephones.**—The statute (§5790 Burns 1908, §4182 R. S. 1881), providing for the incorporation of telephone companies, does not require that all, or any specific part, of the capital stock shall be subscribed for at the time of incorporation. p. 509.

Griffith v. Sprowl—45 Ind. App. 504.

2. CORPORATIONS.—*Capital Stock.—Sale of.—Debts.—Telephones.—Directors.—Acts of.*—A telephone company with an authorized capital stock of \$25,000, \$15,000 of which has been issued, has the right to issue and sell the remainder of such authorized stock; and the act of a majority of the directors in selling a portion of the unissued stock is the act of the company. p. 509.
3. CORPORATIONS.—*Acts of.—Directors.—Fraud.—Concealment of Purposes.*—The act of a majority of the directors in concealing their purpose from the others to do a lawful thing does not constitute fraud. p. 510.
4. FRAUD.—*Presumptions of.*—There is no presumption of fraud in Indiana, but such fact must be alleged and proved. p. 510.
5. CORPORATIONS.—*Officers.—Removal of.*—Where the by-laws of a corporation give the board of directors power to remove officers of the company, when required by the best interests of the company, in the absence of a finding that such removal was against such interest, the removal by the directors will be upheld, such directors having the power to determine what were the best interests of the company. p. 510.
6. CORPORATIONS.—*Acts of.—Judicial Control of.—Fraud.—Illegality.*—In the absence of fraud or illegality, the courts have no power to determine the reasonableness of the acts of a voluntary association. p. 510.
7. CORPORATIONS.—*Capital Stock.—Sale of, for Less than Value.—Special Findings.*—In a suit to enjoin the issuing of unissued shares of the authorized capital stock of a corporation, on the ground that such issue and sale were wholly unnecessary, and to set aside a certain sale made after the filing of the suit on the ground that the sale price was far below the value of the stock, a judgment for defendants will be upheld, there being no finding that defendants knew the value of the stock sold, or that they received any profit therefrom, or that any person would pay more than the amount received for such stock. p. 510.
8. CORPORATIONS.—*Stockholders.—Duty of Majority Stockholder to Others.*—A stockholder who owns a majority of the stock in a corporation, occupies a fiduciary relation to the minority stockholders, and must exercise good faith, care and diligence in the control of the company's property. p. 510.
9. TRIAL.—*Special Findings.—Failure of.—Fraud.*—A failure of the special findings to show fraud is fatal to a suit based upon alleged fraud. p. 513.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Suit by David H. Griffith and another against John S. Sprowl and others. From a judgment for defendants, plaintiffs appeal. *Affirmed.*

W. A. Branyan, Abram Simmons and Frank C. Dailey, for appellants.

W. H. Eichhorn, E. V. Vaughn and U. S. Lesh, for appellees.

COMSTOCK, J.—Appellants brought this suit in the Huntington Circuit Court to enjoin appellees from issuing certain stock not theretofore sold, and from removing one of appellants from the office of secretary and treasurer of appellee company and to require said corporation to give appellants an opportunity to purchase their portion of the unissued stock before offering the same for sale to strangers. Upon change of venue to the court below the cause was put at issue by a general denial. Upon proper request the court made a special finding of facts and stated conclusions of law thereon in favor of appellees, and, over appellants' motion for a new trial, judgment was rendered thereon.

The errors assigned are that the court erred in its conclusions of law, and in overruling appellants' motion for a new trial.

The special findings show substantially the following facts: Appellee corporation was organized March 10, 1904, with a capital stock of \$25,000, divided into 250 shares, for the purpose of operating a telephone system in the counties of Huntington, Wells, Grant and Wabash, Indiana. The incorporators and the stock issued to each are as follows: Frank Canady, thirty shares; John P. Hacker, George W. Griffith, David H. Griffith and L. W. Pully, twenty shares each; John S. Sprowl, Henry E. Layman, J. C. Werly and George D. Kreigbaum, ten shares each; total one hundred fifty shares. David H. Griffith purchased the stock of John P. Hacker and J. C. Werly, and John L. Priddy purchased the stock of George D. Kreigbaum. All of said stock was fully paid at par. At the annual election held on March 14, 1905, all the holders of stock in said company were elected directors for the ensuing year, and on the same day said board of directors organized by electing proper officers, in-

cluding George W. Griffith as secretary and treasurer, and such officers were duly installed and conducted said business up to October 10, 1905. Said officers and directors were the only stockholders of said company. On October 10, 1905, at a regular meeting of the board, a resolution was offered and adopted authorizing the issue and sale of twenty-seven shares of the unissued stock, seventeen shares to be delivered to George S. Good and ten shares to Jonas Good, to be paid for on delivery at \$100 per share, the proceeds of said sale to be used to pay off certain promissory notes against said company. David H. and George W. Griffith voted in the negative. Henry E. Layman was not present. At said session, by a majority vote, over the protest and objection of plaintiffs, Griffith and Griffith, defendants declared the offices of secretary and treasurer vacant, and elected defendant Pully to such offices. Defendants Sprowl, Canady, Pully and Priddy had arranged that such resolution should be offered, had agreed to support it, and had combined to conceal said arrangement from the plaintiffs, who, up to the time said resolution was offered, had no knowledge or information that any such purpose or intention was entertained by said defendants, and they then and there protested against such resolution and against making any sale of the so-called unused capital stock referred to in the resolution. Upon threats of defendants to issue said stock over their objections, plaintiffs, by proper proceedings, obtained a temporary injunction restraining such issue, which was set for hearing before the court on October 23, 1905. By amendment Jonas Good and George S. Good were made parties defendant. On November 10, 1905, upon hearing had, the court dissolved said restraining order.

Up to November 10, 1905, no stock was issued or subscribed for by defendants Good and Good, but on November 25, 1905, defendants Sprowl and Pully, claiming to be president and secretary of said company, and claiming authority under the before-mentioned resolution, issued twenty-seven shares of

stock to defendants Good and Good, who took it and paid therefor the par value, or \$2,700. At the time said resolution was offered and at the time said stock was issued and sold to defendants, the Warren Telephone Company had no debts then due, and the current income of said company was then, and continued to be, amply sufficient to pay all expenses and all debts as they matured, and also to pay large dividends to its stockholders after all expenses and debts were paid. Defendants Good and Good never had any interest in any of the stock or property of defendant company until said twenty-seven shares of stock were issued to them. At the time said stock was issued and sold each share of stock in said corporation then unissued was of a cash value materially in excess of the face or par value thereof. The property of appellee company at that time had a cash value of \$25,000, represented by \$15,000 in stock issued. Defendant company's by-laws, in force March 14, 1905, provided that the president, vice-president, secretary and treasurer should hold office for one year and until their successors were elected and qualified, but that any officer elected by the board of directors might be removed by a majority vote of the entire board, whenever the interests of said company might require it, and these provisions of the by-laws continued in force thereafter. By the provisions of the same by-laws said officers were elected by the board of directors. At said meeting of the directors held on October 10, 1905, a resolution was presented and adopted by a majority of the board of directors declaring it to be to the best interests of the company for said Griffith to be removed from the office of secretary and treasurer, and declaring said office vacant. L. W. Pully was elected to said office and has assumed to act as secretary and treasurer of said company ever since. The money received from the sale of said twenty-seven shares of stock was used in the payment of the indebtedness of the company. After the issuing of said additional shares of stock, defendant com-

pany continued to pay dividends as before, which dividends were accepted by plaintiffs upon the shares of stock owned by them respectively. None of the plaintiffs at any time demanded that any of the unissued shares of capital stock in defendant company be issued to them, and did not at any time offer to take and pay for any of said shares at par or any other price, and did not at any time tender to defendant company any price for the shares of stock which were so issued and sold to defendants Good and Good, or any other portion of the unissued stock of defendant company, and there still remains unissued of the original authorized capital stock, seventy-three shares, of the par value of \$7,300.

Appellants complain of the alleged wrongful sale of said twenty-seven shares of stock and the removal from office of the secretary and treasurer of said company. The law

1. relating to telephone companies provides that the stockholders who incorporate such association shall each sign such articles, giving his place of residence and the amount of stock subscribed by him. It does not require that all, or any specific part, of the stock be subscribed for at the time of incorporation (§5790 Burns 1908, §4182 R. S. 1881). There was \$15,000 in stock subscribed at the time of the incorporation. Just prior to the commencement of this suit appellants jointly were the owners of stock of the par value of \$8,000, and appellees Sprowl, Canady, Priddy and Pully were jointly the owners of \$7,000 thereof. The company had been paying dividends on \$15,000 issued stock and had been borrowing money. In October, 1905, it owed \$2,600 borrowed money, which, however, was not due, but upon which the company was paying interest. The com-

2. pany undoubtedly had the right to issue the full amount of stock authorized by its charter. Four of the seven directors, at a meeting at which all directors except one were present, voted to issue and sell a portion of the unissued stock. The act of the majority of the board became the act of the corporation.

The fact that appellees agreed among themselves upon the course they would and did pursue, and concealed their purpose from appellants, would not be fraudulent if they

3. had the right to do what they did. We may conjecture what their intentions were, but fraud is not presumed, and there is no finding of the ultimate fact
4. of fraud. As shown, when the offices of secretary and treasurer were declared vacant there was in force a by-law providing that any officer might be removed by a majority vote of the entire board, whenever the best interest of said company might require it, and at said date, by a majority vote, the directors declared that the best interests of the company required the removal of said officer. It was for the directors to determine what were the best interests of the company. In the absence of a finding that such removal was against the interest of the company, it will be upheld. In the absence of fraud
6. or illegality, courts have no power to pass upon the reasonableness of the acts of a voluntary association. *Green v. Felton* (1908), 42 Ind. App. 675, and cases cited. While the court found that the stock issued was worth
7. materially more than par value, there is no finding that appellees knew such fact, nor that they profited by the sale. The money received was applied to the debts of the corporation. Nor is it found that appellants or any other person or persons offered, or were ready, willing and able, to buy said stock at par or at any other price.

Among the cases cited by counsel for appellants none are more favorable than the cases of *Elliott v. Baker* (1907), 194 Mass. 518, 80 N. E. 450, and *Wheeler v. Abilene Nat.*

8. *Bank, etc., Co.* (1908), 159 Fed. 391, 89 C. C. A. 477. 16 L. R. A. (N. S.) 892. But they are not in conflict with this opinion. In the last-named case a single stockholder held the majority of the stock. He was its president, its creditor and one of its directors. The four other members of the board were qualified by his transfer of one share

of stock to each. After one of the holders of a minority of the stock had offered him \$3,500 for the property of the corporation and had notified the secretary that he desired to bid for it, the property was sold to the owner of the majority of the stock for \$2,500 (which was its fair value) by means of the regular action of the meeting of the directors and of the meeting of the stockholders, at which the purchaser's stock was voted for the sale. The court properly held that the devolution of unlimited power imposed upon the majority stockholder the duty of a fiduciary or agent to the holders of the minority of the stock, who can act only through him; that it was his duty to exercise good faith, care and diligence to make the corporate property produce the largest possible amount, and that any sale of the property of the corporation by him to himself for less than could be obtained from another is voidable at the election of the minority stockholders.

In the case of *Elliott v. Baker, supra*, the suit was by the stockholders of the Elliott Company in behalf of themselves and others to compel the return to the corporation and the cancelation of a certain certificate for 900 shares of stock. The material findings in the case were that there was a contest between two factions among its stockholders for the control of the Elliott Company, a Maine corporation, having its principal place of business in Boston. In April, 1904, plaintiff Elliott with his friends bought sufficient of the outstanding stock to give them control of the company. Nickerson, who was in Colorado, arranged with a majority of the board of directors, who were his friends, to issue, for \$13 a share, to defendant Foster 900 shares of stock, owned by and held in the treasury of the company, which, if Foster voted with the Nickerson faction, would give it control of the corporation. The justice found that this was not issued in good faith, but to enable Nickerson and his friends to oust Elliott and his friends from the control, and give the control to Nickerson, etc.; that it was not necessary to issue the stock

to raise money, and that the price at which the stock was issued to defendant Foster was less than could have been obtained, in view of the peculiar conditions of affairs, if other stockholders and directors had been allowed to bid. It was further found that there was a secret understanding or arrangement between Foster and Nickerson as to the control of the corporation at the time the stock was issued, and that defendant Foster was in some way cognizant of the purpose for which the stock was issued and a party to it. It was further ruled that if the directors did not issue the stock in good faith and its issue was not required by the condition of the corporation or reasonably necessary for the proper prosecution of its business, but was issued to oust Elliott and his friends, and to give Nickerson and his friends control, and if Foster was cognizant of and a party to such purpose, then, even though the directors believed that it would be for the best interests of the corporation to have the control in the hands of Nickerson and his friends, their conduct would constitute a breach of trust, and the issuing of the stock would be in excess of their authority, and a certificate would be invalid in the hands of Foster, notwithstanding he paid what would have been, under ordinary circumstances, a fair price for the stock. The questions raised were whether the findings were plainly wrong upon the evidence, and as to the correctness of the rulings. The opinion goes on to say that it is peculiarly a case for the application of the rule that the judge who hears the witnesses has opportunities for testing their reliability and veracity which no appellate tribunal can acquire. In the one case fraud is found as a fact. In the other, a fiduciary relation is held to exist, and actual violation of a trust by the majority stockholder in selling to himself the property for which another party was willing to pay more. In this case there is no finding that the secret arrangement to sell the stock was made for the purpose of obtaining control of the corporation, nor is there a finding

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that either of the acts complained of as wrongful or
 9. fraudulent are facts. The absence of such findings is
 against appellants.

Other reasons in support of the judgment of the court are
 presented, but we do not deem it necessary to consider them.
 Judgment affirmed.

HAMPTON v. MURPHY.

[No. 6,238. Filed December 8, 1908. Rehearing denied June 23,
 1909. Transfer denied March 10, 1910.]

1. DECEDENTS' ESTATES.—*Debts.—Sale of Real Estate to Pay.—Petition.*—A petition by an administrator to sell real estate to pay his decedent's debts, which substantially complies with §2354 Burns 1903, §2338 R. S. 1881, is sufficient. p. 519.
2. MORTGAGES.—*Execution by Wife.*—A mortgage executed by a wife to be valid must be signed by her husband. p. 519.
3. DESCENT AND DISTRIBUTION.—*Husband from Wife.—Estoppel.*—A husband, unless estopped. Inherits one-third of his deceased wife's real estate free from her postnuptial debts. p. 519.
4. DESCENT AND DISTRIBUTION.—*Husband from Wife.—Debts.—Estoppel.—Mortgages.*—A husband who joins his wife in executing a mortgage upon her real estate is estopped, at her death, to claim his one-third interest in such land, where such part is necessary to pay the mortgage. p. 520.
5. DESCENT AND DISTRIBUTION.—*Sales of Real Estate to Pay Debts.—Including Husband's Part.—Estoppel.*—Where a surviving husband is made a party to a petition to sell real estate to pay his deceased wife's mortgage debts, and he defaults, a decree being entered to sell the fee simple title, and giving the husband his portion out of the proceeds, and he accepts such portion, receipting the administrator in full for his share, he is estopped from claiming any interest in such real estate. pp. 520, 522.
6. DESCENT AND DISTRIBUTION.—*Husband and Wife.—Mortgage Debts.*—The same rules, as to the payment of mortgage debts, applying to the inheritance by a wife from her husband apply to the inheritance of a husband from his wife. p. 521.
7. DESCENT AND DISTRIBUTION.—*Husband from Wife.—Mortgage Debts.*—A husband's one-third interest in his deceased wife's real estate is liable, if necessary, for the payment of her mortgage. p. 521.

8. **LIMITATION OF ACTIONS.**—*Administrators' Sales of Real Estate.*—A suit by a party for the recovery of real estate sold by an administrator must be brought within five years after the confirmation of such sale (§295 Burns 1908, subd. 4, §293 R. S. 1881), even though the sale was void. p. 521.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Suit by Stephen K. Hampton against William H. Murphy.
From a judgment for defendant, plaintiff appeals. *Affirmed.*

Harley A. Logan, for appellant.

W. B. Hess, Samuel Parker and E. C. Martindale, for appellee.

WATSON, C. J.—Appellant brought this suit by a complaint in three paragraphs. The first was to quiet title to a one-third interest he claimed in eighty acres of land in Marshall county, Indiana. The second was for the partition of said real estate, for the appointment of a commissioner to sell said land, and for an accounting of rents by defendant. The third paragraph alleged, in addition to the averments of the second paragraph, that on September 21, 1896, Emeline Hampton, plaintiff's wife, departed this life, intestate, leaving surviving her this appellant, her husband; that on March 1, 1899, Henry B. Hall was appointed administrator of her estate, and that on June 3, 1899, as such administrator, he filed his petition to sell decedent's real estate to pay her debts, and on August 7, 1899, he sold said eighty acres of real estate to William M. Patterson; that plaintiff's interest in said real estate was not ordered or directed by the court to be sold, and was not sold by virtue of said sale; that plaintiff was the owner in fee of the undivided one-third of said real estate; that defendant has been in possession of said real estate for six years last past, and has had the use, rents and profits thereof, which are of the value of \$1,200; that plaintiff's share thereof would amount to \$400. Plaintiff asks that he be declared the owner of one-third of said real estate, and that it be ordered sold by the commissioner. He

further demands an accounting of the rents and profits for said period of six years.

To this complaint defendant filed his answer in four paragraphs: (1) General denial. (2) Alleging that Emeline Hampton departed this life on September 21, 1896, the owner of the real estate described in plaintiff's complaint, together with other lands situated in said Marshall county, Indiana, and leaving surviving her as her heirs at law, Stephen K. Hampton, appellant herein, William A., Harrison L., and Maud E. Hampton; that on August 23, 1895, said decedent, together with her husband, executed to William M. Patterson a mortgage upon said real estate described in plaintiff's complaint, to secure a note of even date therewith for \$1,775, executed by said decedent to said Patterson; that said mortgage was duly recorded on September 10, 1895, in mortgage record 25, page 87, of the mortgage records of Marshall county, Indiana; that on June 15, 1896, said decedent and her husband executed a mortgage to the People's Loan and Savings Association of Warsaw, Indiana, on which there was due and unpaid at the time of decedent's death the sum of \$350, which mortgage was duly recorded in the mortgage records of Marshall county, Indiana; that the whole of the personal estate of said decedent did not exceed in value \$87.37; that on March 2, 1899, said Stephen K. Hampton filed with the clerk of Marshall circuit court a relinquishment of his right, as the widower of said decedent, to administer upon her estate, and requested that Henry B. Hall be appointed as such administrator, and thereupon on said day said Hall was duly appointed and qualified as such administrator, and caused the personal estate to be inventoried and appraised, which amounted to \$87.37; that on May 24, 1899, William Patterson filed his note and mortgage as a claim against said estate, the amount claimed to be due thereon at that time being \$1,880; that there was also due on the People's Loan and Saving Association's loan, \$375, and \$21 of unpaid taxes on the mortgaged real estate; that the

cost of administration on said estate paid and allowed by said court amounted to \$223.36; that on June 3, 1899, said administrator filed his petition in the clerk's office of Marshall county, asking for an order to sell the real estate embraced in both mortgages to pay said mortgages, taxes, debts and liabilities of said estate; that Stephen K. Hampton, William A., Harrison L., and Maud E. Hampton, William Patterson and the People's Loan and Savings Association were made parties defendant to said petition; that all of said defendants were duly served by the sheriff of Marshall county with notices thereof, except William M. Patterson and the loan association, which parties waived issuing of notice, appeared and filed answers; that said Stephen K. and William A. Hampton failed to appear, either by person or attorney, and were duly defaulted, and said Harrison L. and Maud E. Hampton appeared by guardian *ad litem*, who filed answer to said petition for and on behalf of said minors; that said administrator asked that he be granted an order by said court to sell said real estate described in said petition to pay the debts and liabilities, and that it be sold free from all liens and encumbrances thereon; that upon the hearing thereof the court found that said William M. Patterson held a mortgage on said eighty acres of real estate on which there was due on June 21, 1899, \$1,888.45; that there was the further sum of \$81, taxes and penalties due on said real estate on a tax certificate held by Julia E. Thompson; that the People's Loan and Savings Association held a lien on a house and lot embraced in their mortgage; that the court ordered all of said real estate described in said petition to be sold as prayed for therein, and that the liens and mortgages of said Patterson and the People's Loan and Savings Association attach to and follow the funds arising from such sales; that all of said real estate was duly sold according to the order of the court after due notice of the time, place and terms of said sale as required by law; that appellant counseled, advised and consented that

his interest, as widower of said decedent, in and to the real estate described in the petition by order of court be sold, and agreed to take his interest therein out of the proceeds of said sales after the payment of said mortgages, taxes and other just and proper claims; that said eighty acres, on August 7, 1899, was duly sold to William M. Patterson, who bid \$1,987.84, which was the highest and best bid therefor; that said Patterson afterwards, for value, assigned said certificate so issued to him by said administrator to this defendant, William H. Murphy; that afterwards, to wit, on November 1, 1899, said administrator, by order of the court, executed a deed to said eighty acres of land to said Murphy, who thereupon took immediate possession thereof, by virtue of his said deed, and has ever since been in open, notorious, uninterrupted and exclusive possession thereof; that the amount realized from the sale of said eighty acres of land was not sufficient to pay and satisfy in full the Patterson mortgage thereon and the tax certificate held by Julia E. Thompson; that said Stephen K. Hampton afterwards receipted to said administrator in full for his interest in and to the personal estate and his surplus from the sale of the real estate other than the eighty acres described in the petition after the payment of the savings association's mortgage, taxes and costs.

The third paragraph of answer alleged substantially the same facts as are alleged in the second paragraph, and also set out the receipt of Stephen K. Hampton to Henry B. Hall, administrator, which is as follows:

“Received November 8, 1899, from Henry B. Hall, administrator of the estate of Emeline Hampton, deceased, the sum of \$321.31, in full of my share of the personal property and real estate of said estate, which has been sold by said administrator, as the surviving husband of said decedent. Stephen K. Hampton.”

The fourth paragraph, in addition to the facts alleged in the second and third, in the prayer demanded that appellant ought not to maintain this suit, for the reason that the cause

of action did not accrue within five years before the bringing of this action. Appellee also filed a cross-complaint, in two paragraphs, to quiet title to said real estate. Demurrers were filed to the second, third and fourth paragraphs of answer, and also to the second paragraph of appellee's cross-complaint, which averred substantially the same facts as alleged in the second, third and fourth paragraphs of answer. The court overruled each of these demurrers. The cause was then put at issue by general denials. The errors assigned are the overruling of the demurrers to the second, third and fourth paragraphs of answer and the second paragraph of cross-complaint, and the overruling of the motion for new trial.

The appellant says that the decision of this case is controlled by the fact as to whether the petition by the administrator was sufficient to confer jurisdiction on the court to order appellant's land, as widower of said decedent, sold. The petition filed by the administrator, making Stephen K., William A., Harrison L., and Maud E. Hampton, William M. Patterson and the People's Loan and Savings Association parties defendant, averred the following: That the personal estate of said decedent amounted to \$87.37, as shown by the inventory and appraisal on file in said estate; that the indebtedness of said estate that has come to the knowledge of the administrator, including taxes and mortgages, amounted to \$2,500; that the personal property would be insufficient to pay the taxes, debts and expenses of the administration, aside from the liens on the real estate; that there was filed and pending against the estate a claim of William M. Patterson on his note, secured by mortgage, for \$1,775; that there was outstanding a tax certificate on said real estate for the sum of \$80; that William M. Patterson held a mortgage executed by decedent and her husband against the real estate in controversy, to secure the payment of said \$1,775, which mortgage was recorded in mortgage record 25, page 87, in the mortgage records of Marshall

county, Indiana; that the People's Loan and Savings Association held a mortgage executed by decedent and husband to secure the sum of \$500, which mortgage was recorded in mortgage record 28, page 239, of the mortgage records of Marshall county, Indiana, alleging that both of said mortgages were due; that the probable value of the eighty acres, which is the subject of this controversy, was \$2,400; that the probable value of the house and lot was \$1,000. A description of the real estate asked to be sold, of which decedent died seized, was set forth. It was alleged that said decedent died intestate, leaving surviving her Stephen K. Hampton, widower. William A., Harrison L., and Maud E. Hampton, children. The administrator prayed that an order be granted to him, as said administrator, to sell said real estate to pay the debts and liabilities, and that the same be sold free of all liens and encumbrances thereon.

The court thereupon ordered that all the land that was embraced in the petition be sold, free from all liens, and that the liens of said mortgages immediately attach to and follow the funds arising from the sale of real estate covered by said mortgages respectively to the extent of the amount due on account thereof. The petition by the admin-

1. istrator to sell the real estate of the decedent averred facts sufficient to comply substantially with §2854 Burns 1908, §2338 R. S. 1881.

The answers as well as the cross-complaint aver the execution of the note and mortgage by decedent, and that appellant joined her in the execution of the mortgage to

2. William M. Patterson. Not until he had joined her in the execution of the mortgage did it become valid.

Section 3016 Burns 1908, Acts 1891, p. 71, §1, provides that if a wife die testate, or intestate, leaving a widower, one-third of her real estate shall descend to him, sub-

3. ject, however, to its proportion of the debts of the wife contracted before marriage. It is not therefore subject to the payment of the general debts of the deceased

wife. He takes the one-third under the statute absolute, and his right cannot be molested, except in case where he has waived it by agreement or has estopped himself from any claim to it. *Roach v. White* (1884), 94 Ind. 510; *O'Hara v. Stone* (1874), 48 Ind. 417; *Banta v. Smith* (1908), 41 Ind. App. 364; *Huffman v. Copeland* (1894), 139 Ind. 221.

If the husband has joined his wife in the execution of a mortgage upon her real estate he is estopped from denying the jurisdiction of the probate court to order all the

4. real estate sold thus mortgaged, if necessary to pay and discharge the mortgage lien. *Kemph v. Belknap* (1896), 15 Ind. App. 77; *Pearson v. Kepner* (1902), 29 Ind. App. 92; *Herbert v. Rupertus* (1903), 31 Ind. App. 553.

The third paragraph avers more than acquiescence or standing by. It charges, and the evidence supports the paragraph, that appellant participated in the sale of

5. the real estate; that he said unless the Patterson bid was raised he would not get a cent, and tried to induce the party to raise the Patterson bid; that he procured the appointment of the administrator, permitted the petition to sell the real estate to go by default, receipted to the administrator for the surplus of the proceeds arising from the sale of other real estate described in the petition and sold under the same order, terms and conditions as the real estate was sold embraced in the Patterson mortgage. He is therefore estopped from challenging the validity of the proceedings or sale of the real estate. *Pepper v. Zahnsinger* (1884), 94 Ind. 88; *Smock v. Reichwine* (1889), 117 Ind. 194; *Lewis v. Watkins* (1898), 150 Ind. 108; *Armstrong v. Hufty* (1901), 156 Ind. 606. In the case of *Lewis v. Watkins, supra*, the court said: "If, however, the widow consents to such sale by the administrator under order of the court, and afterwards receives her share of the purchase

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money, she would be estopped from disputing the validity of the sale.”

There is neither reason nor equity for a different rule, as to the power of the court to order the whole of the real estate sold upon a proper petition, to be applied to a

6. widower, who has joined with his wife in the execution of the mortgage upon her land, than is applied to a widow who has joined her husband in the execution of a mortgage on his real estate.

It must be borne in mind that the eighty acres which was embraced in the mortgage did not sell for a sufficient sum to pay and discharge the liens thereon, and until these

7. liens, one the taxes and the other the Patterson mortgage, were paid in full appellant could have no right in the proceeds from the sale of the land. Having signed the mortgage, the court had the power to order the whole of the land embraced therein sold, if necessary to pay and satisfy the mortgage lien.

It is earnestly insisted that this suit cannot be maintained, for the reason that more than five years has elapsed from the confirmation of the sale of the real estate by

8. the probate court and the commencement of this suit.

That titles to real estate are protected under subdivision four of §295 Burns 1908, §293 R. S. 1881, has been uniformly held in actions to recover real property by a party to the proceedings. As in this case, appellant's right under said clause to recover one-third of the eighty acres of land, or to quiet the title thereto, is barred after the expiration of five years from the confirmation of said sale by the probate court, and this is true even though the sale be void. *Vancleave v. Milliken* (1859), 13 Ind. 105; *Vail v. Halton* (1860), 14 Ind. 344; *White v. Clawson* (1881), 79 Ind. 188, and cases cited; *Davison v. Bates* (1887), 111 Ind. 391; *Parmerton v. Hoop* (1892), 131 Ind. 23; *Hawley v. Zigerly* (1893), 135 Ind. 248; *Fisher v. Bush* (1892), 133 Ind. 315; *Armstrong v. Hufty, supra*; *Axton v. Carter* (1895), 141

Ind. 672; *Barton v. Kimmerley* (1905), 165 Ind. 609, 112 Am. St. 252. It was said in the case of *Fisher v. Bush*, *supra*, at page 319: "The action is to recover real estate sold by an administrator under an order of court, specially directing the sale, and the time for the bringing of the action is limited by the fourth subdivision of §295 Burns 1908, §293 R. S. 1881. It has been held that such actions are barred in five years, though the sale be absolutely void."

We find no error in the record, and the judgment is therefore affirmed.

ON PETITION FOR REHEARING.

WATSON, J.—Appellant in his brief on behalf of his petition for a rehearing earnestly insists that the opinion in this cause is contrary to the holdings in the following

5. cases: *Kent v. Taggart* (1879), 68 Ind. 163, *Compton v. Pruitt* (1882), 88 Ind. 171, and *Nutter v. Hawkins* (1884), 93 Ind. 260. In the case of *Kent v. Taggart*, *supra*, it is shown that the widow was not a party to the petition to sell, nor does it affirmatively show that she joined with her husband in a mortgage, whereby the court would acquire jurisdiction to sell her one-third interest, if necessary, to pay the mortgage debt. In the case of *Compton v. Pruitt*, *supra*, while the petition does not so say, yet the court held that it did state facts that were equivalent to the statement "that only two-thirds of the land was liable to be made assets." Therefore the court had no jurisdiction to order the other one-third sold. In the case of *Nutter v. Hawkins*, *supra*, the Supreme Court held that the probate court had no power or jurisdiction to order the sale of the widow's interest, for the reason that it appeared on the face of the record that her one-third interest was not liable to be made assets for the payment of her deceased husband's debts. But in this case it appears in the petition and in the answers and cross-complaint that decedent, Emeline Hampton, and appellant, Stephen K. Hampton, her husband,

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had executed a mortgage to William M. Patterson on the real estate ordered sold, of which one-third thereof is the subject of this controversy. Hence the rulings in these cases apply to the given state of facts in the case at bar.

In the case of *Lantz v. Maffett* (1885), 102 Ind. 23, it was claimed that, in a proceeding to sell real estate by the administrator, the heirs were only required to meet the allegations of the indebtedness of the decedent, and no question of title to the real estate was involved. In the consideration of that case the court said at page 30: "If this assumption were correct, then there would be no reason for the petition to aver ownership in the decedent, or for making the heirs parties to answer as to their interests in the land. * * * The fallacy of this argument is apparent; it unduly assumes that the heir is only challenged to meet the allegation of indebtedness; whereas he is challenged to meet that claim and also meet the claim that the land was owned by the deceased, and is subject to sale for the payment of his debts. One of the most important issues which the heir, or other party, is challenged to meet is the right of the administrator to sell the land. That such an issue should be met and settled is demanded by high considerations; it is demanded by the interests of society, which require the firm and speedy settlement of controversies; it is demanded for the security of purchasers at administrators' sales; it is demanded for the benefit of heirs and creditors who have an interest in securing confidence in judicial sales, and it is demanded in order to give stability to titles and inspire confidence in the judgments of the courts."

Appellant was made a party to the proceedings to sell said real estate. If, therefore, he believed he was the owner of one-third of the real estate described in said petition, and that the administrator of the estate of Emeline Hampton, deceased, was not entitled to an order to sell the whole thereof, he should have contested the ownership and the proceedings as to the right of said administrator to procure such

an order. This petition presented these questions and they were permitted to go by default by appellant, and decided against him upon said default and proof of the allegations of said petition. He is therefore estopped from now asserting any title to said real estate. *Parker v. Wright* (1878), 62 Ind. 398; *Lantz v. Maffett, supra*; *Armstrong v. Hufty* (1901), 156 Ind. 606.

The petition for rehearing is therefore denied.

HUDSPETH, GUARDIAN, v. KITCHEN ET AL.

[No. 6,732. Filed October 8, 1909. Rehearing denied December 16, 1909. Transfer denied March 11, 1910.]

1. GUARDIAN AND WARD.—*Report.—Exceptions.—Special Findings.—Motion for a Ventre de Novo.—Action.*—Where the special findings, on exceptions to a guardian's final report, two items only of such report being contested, are sufficient, when considered along with the remainder of such report, upon which to base a judgment, a motion for a *ventre de novo* should be overruled, such proceeding not being an ordinary civil action. p. 526.
2. GUARDIAN AND WARD.—*Contracts with Attorneys.*—A contract between a guardian and an attorney relative to attorneys' fees in the guardianship, is not conclusive upon the probate court. p. 528.
3. GUARDIAN AND WARD.—*Appointment.—Bonds.—Attorney and Client.—Fees.*—Compensation for the services of an attorney in securing the appointment of a guardian, and in the execution of his bond, is not payable out of the ward's estate. p. 529.
4. GUARDIAN AND WARD.—*Attorneys' Fees.—Allowance for.*—Guardians can be allowed only a reasonable sum for attorneys' fees; and if credit is asked for large sums paid an attorney pursuant to a contract with such attorney, such contract must be shown to be fair and reasonable. p. 529.

From Warrick Circuit Court; *Roscoe Kiper*, Judge.

Final report of Joseph M. Hudspeth, as guardian of Allie R. Kitchen and another, to which Allie R. Kitchen and another except. From the judgment rendered, the guardian appeals. *Affirmed.*

Thomas W. Lindsey, for appellant.

Edward Gough and *Roger D. Gough*, for appellees.

RABB, J.—Appellant was duly appointed guardian of appellees, and upon appellee Allie R. Kitchen's coming of age, filed his final report and asked to be discharged from his trust. In his final account he claimed credit for sums amounting in the aggregate to \$324, paid out as attorneys' fees, for \$50 for his own services, and for a certain amount for expenses incurred in conducting the business of his trust. Exceptions were filed by said appellee to this final account, on the ground that the charges for attorneys' fees and for his own services and expenses were unreasonable. The issues arising on the exceptions were submitted to the court for trial, and at the appellant's request a special finding of facts was made and conclusions of law stated thereon by the court. Appellant excepted to each conclusion of law, and his motions for a *venire de novo* and new trial were overruled, and judgment rendered requiring appellant to restate his account, taking credit for \$275, and no more, for attorneys' fees, and \$26.65 and no more, for his services.

It is insisted by appellant: (1) that the court below erred in its conclusions of law upon the facts found; (2) that the facts found were not sufficient to authorize judgment thereon, and that the court erred in overruling his motion for a *venire de novo*; (3) that the evidence is insufficient to support the finding of the court.

Appellant filed his final settlement and account in the court below, in which he charged himself with an aggregate sum of \$716.60 received by him on account of his trust, and claimed credit for various items, principally expenses of guardianship. Among other items was the sum of \$324.45, paid out as attorneys' fees, and the sum of \$50 for his services. The exceptions filed called in question these two items alone in his account, all others, so far as the questions here are involved, were unchallenged, and it was the issue thus presented which the court tried, and upon which the finding was made. Therefore the only question the court was required to determine was what was a reasonable allow-

ance to be made to appellant for attorneys' fees in connection with the guardianship, and what was a reasonable compensation for appellant's services as guardian. Upon these issues appellant had the burden, and unless the facts established by the special finding affirmatively show that appellant was entitled to a greater sum than that allowed to him by the court for either one or both of these items, he must fail. A great deal of evidentiary matter is set out in the special finding. The only facts found, that are relevant to the issues raised by the exception, are that attorneys' services were performed for the guardian in the management of the trust that were reasonably worth \$275, and the conclusions of law and the judgment of the court following them allows appellant credit for this sum in his account; and that his services as guardian were worth, reasonably, \$26.65, and the conclusions of law and judgment of the court following allow appellant for this sum on this account. No error, therefore, intervened in the conclusions of law stated upon the facts found. It is urged that the finding is so deficient that no judgment could properly be rendered thereon, for the reason that the court does not state specifically for what sum the guardian shall take credit, or with what sum he shall charge himself.

This is not an ordinary civil action. It is an exception to the final report and account of a guardian, in which an issue is raised as to two items of credit claimed in the

1. account challenged, all other items of the account both of charges and credits stand as they appear in the account, and the special finding of facts is to be read in connection with this account to which the exceptions are filed, and the proper judgment in such cases is that the guardian restate this account to conform to the finding and the judgment of the court, and when in this case the special finding is so read it is a sufficient finding of facts to support the judgment, and the appellant's motion for a *venire de novo* was properly overruled.

The facts disclosed by the evidence are that appellee Allie R. Kitchen was the wife of Jesse E. Kitchen, who was the owner of the fee in eighty acres of land in Warrick county, which was subject to a life estate in favor of his mother, and which was also subject to a mortgage thereon, executed by Jesse E. Kitchen and appellee Allie R. Kitchen to secure a debt of Jesse E. Kitchen for \$700. Jesse E. Kitchen died the owner of said land and insolvent, leaving debts, besides said mortgage debt, of about \$1,300, and leaving appellee Allie R. Kitchen, his widow, and Helen A. Kitchen, his child, as his only heirs. The wife and husband were not living together at the time of his death, and upon his death the husband of his sister took out letters of administration upon his estate, took possession of and converted to his own use personalty worth \$100, and sold off of said land standing timber worth \$150. In this condition of affairs appellant was appointed guardian of appellees upon suggestion of an attorney who had been consulted regarding the estate. Immediately after his appointment, without any investigation whatever as to the condition of the estate of his wards, he entered into a written contract with the attorney, who suggested and procured his appointment as guardian, whereby he, in consideration of the attorney's services in securing his appointment as guardian of appellees, and assisting in securing his bond and in looking after and protecting the interests of his wards, agreed to give the attorney one-half of the entire trust estate. Suit was brought by the guardian against the administrator of the husband's estate to recover the value of the timber sold by him off of the land, and \$150 was recovered for the wards in this action. An application to remove the administrator was made by the guardian, in the name and on behalf of the wards, and upon this application the administrator was removed, and an administrator *de bonis non* appointed. Application was made by the administrator to sell the real estate to pay debts, making parties thereto the appellees, and also the mother of

decedent. The mother appeared and asserted an interest in the land, filing a cross-complaint, seeking to set aside a deed by which she had conveyed some interest in the land to decedent. The evidence does not clearly disclose what interest was conveyed by this deed from the mother to the son. The litigation between the mother on one side and the administrator and the appellees on the other resulted favorably to the administrator and the appellees. It appears from the evidence that the decedent acquired some part of the title to the eighty acres by inheritance from his father, but just what part does not appear. The inference is that as to this part of the title there was no dispute between the parties, and that the litigation related entirely to the interest in the land conveyed by the mother to her son. In all this litigation the attorney with whom the guardian contracted represented both the estate and the appellees, and for his services rendered to the estate the attorney was paid by the administrator of the estate. Two-thirds of the land was ordered sold at administrator's sale, and was purchased by the appellant, realizing just enough to pay the preferred claims, including expenses of the administration, leaving nothing whatever for the appellees. One-third interest in the land which appellee Allie R. Kitchen took as the widow of her deceased husband was subsequently ordered sold to pay the expense of the guardianship. At the sale the appellant's attorney bid it in for \$516.50. There were some small items of interest, aggregating \$50.10, which with the \$150 recovered from the administrator on account of timber sold from the land made an aggregate of \$716.60 of assets received by appellant as guardian. Appellant seriously contends

2. that in this case the court was absolutely bound by the contract entered into between him and the attorney, and had no right to refuse to allow the guardian credit for the sum paid out as attorneys' fees under it; and that, after deducting what is claimed to be the expenses of the guardianship the attorney was entitled to one-half of the

entire remainder of the estate. This is a mistaken view. If it were admitted that the contract entered into by the guardian was just and reasonable, after diligent investigation of the condition of the wards' estate, and with due regard to their interests, a different question would be presented; but this is not admitted, nor does the evidence require or permit of any such conclusion. The contract on its face was unjust

and unreasonable to the wards, and one which the
3. guardian had no right to make, in that it provides that the wards' estate shall pay for the services of the attorney in procuring the appointment of the guardian and for procuring his bond. These are not services for which an attorney is entitled to compensation from the wards' estate. The law does not contemplate payment of attorneys' fees for services of this character. Evidence discloses that the contract was entered into without due regard to the interests of the wards and without knowledge or effort to acquire it on the part of the appellant as to the condition of his wards' estate; and without knowledge as to whether litigation would be required to protect the interest of the wards in any property, or what the character of the litigation would be, or what the services of an attorney could be obtained for.

When a guardian comes before the court claiming credit against the estate of his ward for large sums of money paid out as attorneys' fees, the burden is upon him to show

4. that services rendered, for which the money was paid, were necessary and the fees paid were reasonable; and if he claims the services were rendered and the money paid under a contract made without approval of the court, he must show that the contract was a fair one, made after the exercise on his part of such diligence as a reasonable and prudent person would exercise in entering upon such contract in his own behalf under similar circumstances. The evidence wholly fails to bring the contract between appellant

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and the attorney within this rule, and appellant cannot complain of the finding of the court under the evidence.

Judgment affirmed.

INDIANAPOLIS FOUNDRY COMPANY v. BRADLEY.

[No. 6,800. Filed October 26, 1909. Rehearing denied March 11, 1910.]

1. MASTER AND SERVANT.—*Factory Act.—Emery-Wheels.—Dust.—Burden of Proof.*—In an action by a servant against his master for the injury of an eye by dust from an emery-wheel, the burden is upon the plaintiff to prove that he was a servant, that he was operating an emery-wheel not properly provided with an exhaust-fan, that it was practicable to provide such exhaust-fan, and that the injury occurred in the manner alleged. p. 532.
2. WORDS AND PHRASES.—“*Dust.*”—“Dust” ordinarily imports fine, dry particles of earth or other matter capable of being carried by the wind. p. 533.
3. MASTER AND SERVANT.—*Factory Act.—Emery-Wheels.—“Dust.”*—The word “dust,” as used in §8029 Burns 1908, Acts 1899, p. 231, §9, requiring factory owners to provide proper exhaust-fans to carry away the “dust” created, includes particles of emery and iron, where iron is being ground on an emery wheel. pp. 533, 534.
4. MASTER AND SERVANT.—*Factory Act.—Emery-Wheels.—Dust.—Instructions.—Question for Jury.*—An instruction that the statute (§8029 Burns 1908, Acts 1899, p. 231, §9) requires that exhaust-fans for emery-wheels shall be of sufficient power to remove all dust, and that the jury must decide whether the alleged particles causing the injury complained of were “dust” within the meaning of the statute, is correct. p. 534.
5. MASTER AND SERVANT.—*Factory Act.—Emery-Wheels.—Dust.—Instructions.—Presumptions.—Verdict.—Jury.*—A general verdict for plaintiff in an action for injury to an eye caused by dust from an emery-wheel, is a finding that plaintiff's eye was injured by dust, and, in the absence of an instruction technically defining “dust,” the presumption is that the jury understood the word in its ordinary sense. p. 534.

From Superior Court of Marion County (70,137); *James M. Leathers*, Judge.

Action by Andrew J. Bradley against the Indianapolis Foundry Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Indianapolis Foundry Co. v. Bradley—45 Ind. App. 530.

Robert W. McBride, for appellant.

Joseph B. Kealing, Martin M. Hugg and Henry N. Spaan,
for appellee.

COMSTOCK, J.—Action by appellee to recover damages for personal injuries alleged to have been sustained by him because of the failure of appellant to equip a certain emery-wheel with an exhaust-fan. Issues were formed on the two paragraphs of complaint by a general denial. A trial by jury was had and a verdict for \$900 returned in favor of appellee. Appellant's motion for a new trial was overruled and judgment rendered on the verdict.

The only error assigned, and upon which appellant relies for a reversal, is that the court erred in overruling its motion for a new trial.

In so far as this appeal is concerned, there is no very material difference in the two paragraphs of complaint. It is sufficient to say that both of them, in substance, allege that appellant is a corporation engaged in manufacturing iron castings at Indianapolis, Indiana; that in said manufacture it operates emery-wheels at a high rate of speed, on which castings are ground; that, when castings are ground on said wheels, dust, composed of grindings of iron and emery, are thrown and blown from them; that appellee was employed by the appellant to grind castings on said emery-wheels; that appellant had carelessly, negligently and wrongfully failed to equip, or in any manner provide, said emery-wheels with exhaust-fans with sufficient power to carry off said dust from said wheels; that appellee, while grinding castings on one of said emery-wheels, was injured by dust thrown and blown from said wheel into his eye; that appellee's injuries were caused solely by the carelessness, negligence and wrongfulness of appellant in not providing said emery-wheel with an exhaust-fan, and would not have occurred otherwise.

Appellant asks for a reversal upon the following grounds:

(1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law; (3) that the court erred in refusing to instruct the jury as asked.

The first two of these present substantially the same question, viz.: A material averment of each paragraph of the complaint was that defendant had one of his eyes injured by dust getting into it while he was engaged in operating an emery-wheel for appellant, it being alleged that appellant was negligent in failing to obey a statutory requirement and equip the emery-wheel with an exhaust-fan for the removal of the dust. It is the contention of appellant that there was no evidence whatever to show that appellee's eye was injured by dust, or that any dust ever at any time got into or affected his eye, and, upon this absence of proof, appellant insists that the verdict was not sustained by sufficient evidence and was contrary to law.

The action is predicated upon that part of §8029 Burns 1908, Acts 1899, p. 231, §9, which reads as follows: "Ex-

haust-fans of sufficient power shall be provided for
1. the purpose of carrying off dust from emery-wheels and grindstones and dust-creating machinery from establishments where used." To warrant a recovery, the burden was on plaintiff to show that he was an employe of defendant; that as such employe he was operating an emery-wheel for his employer; that said emery-wheel was not equipped with an exhaust-fan; that it was practicable to provide said emery-wheel with an exhaust-fan; that plaintiff was injured by dust thrown from said wheel; that his injury was caused in the manner alleged. The only one of these material facts, which we think can be questioned upon the evidence, is, whether the object which struck and injured the eye of appellee was dust, within the meaning of the statute.

The word "dust" has been defined as "fine, dry particles of earth or other matter so comminuted that they may be

raised and wafted by the wind; that which is
2. crumbled to minute portions; fine powder, as clouds
of dust; bone dust." Webster's International Dict.
"Earthy or rocky matter pulverized so fine as to be borne
away easily by the wind; any substance reduced to powder;
as, diamond-dust." Standard Dict. "Earth or other mat-
ter in fine dry particles, so attenuated that they can be raised
and carried by the winds. Finely powdered or pulverized
matter." Century Dict.

We believe that the popular definition, the general sense in
which the word "dust" is used, is, fine, dry particles of mat-
ter, that may be raised and carried by the wind. There is no
rule to determine the size of the particle, nor the matter of
which it is composed.

One purpose of the statute is to reduce the hazards inci-
dent to the operation of emery-wheels. It requires that
exhaust-fans of sufficient power shall be provided for
3. the purpose of carrying off dust from "emery-wheels
and grindstones and dust-creating machines." Ap-
pellee testified that the dust thrown off the wheel in question
was "emery and iron." We think the legislature failed in
its purpose if the statute did not apply to the particles of
created matter thrown from the wheels while in operation,
as well as any dust likely to be present in rooms in which
dust-creating machines are operated.

The instructions refused are as follows: "(4) The law
which provides for the use of exhaust-fans in connection with
emery-wheels requires that they should be of sufficient power
to remove all dust. The court cannot tell you as a matter
of law when a particle of matter is or is not to be considered
as dust, within the meaning of this statute. Such questions
are questions of fact, and must be determined by you from
the evidence. (5) The law which requires the use of ex-
haust-fans in connection with emery-wheels requires that
they shall be of sufficient power to remove all dust. The

court instructs you that the term 'dust,' as thus used, is to be construed in accordance with the ordinary and generally accepted meaning of that term. (6) The court further instructs you that the term 'dust,' as used in said statute, should not be construed as meaning and including sparks and glowing particles of emery and iron thrown off from emery-wheels when in use, unless such meaning falls within the ordinary and generally accepted definition of the term dust."

The court gave, in substance, the first one of these, but refused to give the other two, and gave no instructions equivalent to them. It is conceded by the learned

4. counsel for appellant that the court could not say, as a matter of law (see *Muncie Pulp Co. v. Hacker* [1906], 37 Ind. App. 194), that a piece of emery is not dust, but it is insisted that it could properly give to the jury a rule for determining from the evidence whether the offending substance that entered appellee's eye was dust within the meaning of the statute. The fifth instruction refused would have told the jury that the term "dust," as used in the statute, is to be construed in accordance with the ordinary and generally accepted meaning of that term.

Said sixth instruction would have excluded sparks and glowing particles of emery and iron, unless they were included within the ordinary and generally accepted

3. definition of the term dust. If it would have been improper to instruct that emery was not dust, it would be equally improper to intimate or suggest, which the sixth instruction does, that particles of emery and iron were not dust.

By its verdict the jury found that the particle which injured plaintiff's eye was dust, and plaintiff's testimony so denominated it. In the absence of any instruction by

5. the court defining "dust," that is, in the absence of any technical definition, it will be presumed that the jury understood the word in its usual and ordinarily accepted meaning.

Boyce v. Holloway—45 Ind. App. 525.

Counsel have cited authorities upon the rules for the construction of statutes. About them there is no controversy. Applying them to the facts before us, appellee's case is within the statute.

Judgment affirmed.

BOYCE ET AL. v. HOLLOWAY.

[No. 6,639. Filed March 11, 1910.]

1. **SPECIFIC PERFORMANCE.—Sales.—Description of Lands.—Fraud.—Complaint.**—A complaint alleging that defendants sold to the plaintiff all of the lots owned by them within a certain enclosure except one lot in the southwest corner and possibly two in the southeast corner, that in executing the deed they omitted certain other lots which they owned, that the plaintiff paid the agreed price, and that as soon as he ascertained the facts he demanded a conveyance of the remainder, which was refused, is sufficient, the description of the land contracted for being capable of ascertainment. p. 537.
2. **SPECIFIC PERFORMANCE.—Sales of Lands.—Consideration.—Fraud.**—The fact that vendors contracted to sell certain lots for less than their market value does not justify them in fraudulently refusing to include all of such lots in their deed. p. 539.
3. **SPECIFIC PERFORMANCE.—Real Property.—Contracts.—Inadequacy of Consideration.**—Specific performance lies to enforce contracts for the sale of real estate; but inadequacy of price can be invoked as a defense only so far as it furnishes evidence of fraud as a fact. p. 539.
4. **APPEAL.—Weighing Evidence.**—The Appellate Court will not weigh conflicting evidence. p. 539.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Suit by Jonathan Holloway against James Boyce and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

Claude C. Ball and *Smith & Moran*, for appellants.

Orr & Orr, for appellee.

MYERS, C. J.—Appellee sued appellants, James and Margaret Boyce, husband and wife, for specific performance of a contract for the sale and conveyance of certain real estate. A demurrer to the complaint for want of sufficient facts was

overruled, and this ruling and the overruling of appellants' motion for a new trial are assigned as errors.

From the complaint it appears that appellant James Boyce, was on May 5, 1906, and for some time prior thereto had been, the owner of a certain tract of land in Jay county, Indiana, which was enclosed by a wire fence; that prior to said date said tract had been platted into town lots, streets and alleys, and was a part of what was designated on the plat book of said county as "James Boyce's First and Second Additions to the Town of Redkey;" that the streets and alleys had not been graded nor improved, and there was nothing to indicate their location, or the location and boundaries of the lots, or to indicate that said tract of land had been platted into lots, and said tract was without any buildings thereon; that on said May 5 defendant James Boyce and plaintiff, both of whom resided at Muncie, went to Redkey to view said premises and to negotiate for the purchase and sale thereof; that said defendant then pointed out to plaintiff said tract of land enclosed by said fence, and represented to plaintiff that he owned all the lots and lands thus enclosed, except lot No. 39, in the southwest corner thereof, and possibly two lots in the southeast corner of the enclosure, which he had already given, sold or conveyed; that said defendant then offered to sell and convey to plaintiff, by a warranty deed, subject to all the taxes for the year 1906, all the lands then held and owned by him lying within said enclosure, at and for the price of \$700, which offer plaintiff then accepted, and agreed to pay said defendant said sum for the lands within said enclosure, then held and owned by him. On May 7, 1906, in pursuance of said contract of purchase and sale, defendants made and executed to plaintiff a proper deed of conveyance for all of said lots within said enclosure in said second addition, but wrongfully and fraudulently, and with fraudulent intent to cheat and defraud plaintiff, omitted from said deed a description of all lots and tracts then owned by them in said first addition

within said enclosure, and tendered said deed to plaintiff in fulfillment of their said contract; that plaintiff was entirely ignorant of the proper description and designation of said lots, and the location of said streets and alleys, never having seen any plat thereof; that relying wholly upon the defendants fully and properly to describe said lots within said enclosure, as aforesaid, and believing said deed properly described and conveyed the lots, he accepted said deed and paid defendants \$700, and had said deed recorded; that defendants, in pursuance of said contract put plaintiff in the full possession of the land so enclosed. On May 11, 1906, plaintiff, for the first time, learned that said deed did not convey all of said tract, as contracted for, purchased and paid for by him, and that the lots and parts of lots owned by defendants in said first addition to said town were omitted from said deed; that plaintiff at once made known that fact to defendants, and demanded that they execute to him the proper deed of conveyance for said omitted lots and parts of lots in said enclosure, and that they comply with and perform their said contract, and which they wrongfully and fraudulently refused, and still fail and refuse to do, to plaintiff's damage, irreparable loss and injury. It is then alleged that James Boyce represented Margaret Boyce, his wife, and in the execution of said contract acted for and in her behalf and as her agent, with full authority so to do, and that his acts and representations in the premises were done with her knowledge and consent, and accepted and ratified by her; that plaintiff has fully performed all of the conditions of said contract on his part to be performed, and that no equities or rights of third parties have intervened.

Appellants assert that the contract recited in the complaint was "too indefinite upon which to predicate an action for specific performance," because, when the vendor

1. pointed out the enclosed field, subdivided into town lots, he stated he had sold one lot in the southwest

corner of the enclosure and possibly two lots in the southeast corner. The contract made May 5, 1906, was for the sale and conveyance of all that portion of the enclosed land owned by the vendor. The deed of conveyance delivered May 7, 1906, omitted thirteen lots and possibly two other lots in the enclosure, then owned by the vendor.

The offer to pay a certain price was based upon the representation of ownership of all the field except one lot and possibly two other lots, the location of the excepted lots being designated. The vendee expressed his willingness to purchase the remainder, leaving it to the vendor to execute a deed by which he would convey all he owned of the land pointed out. The vendor received the full price agreed upon and put the vendee in possession of all the land contemplated in the agreement, but omitted a definite portion thereof from the deed. There is no uncertainty or indefiniteness in the description of the land for the conveyance of which this suit was brought, the transfer of which was within the meaning and terms of the contract.

The description of the land in the contract was sufficient to furnish the means of identification. While it may be incomplete, yet its completion does not require the contradiction or alteration of that given. The boundary of the land was distinctly fixed by the fence which surrounded it. The contract was for the sale and conveyance of all the land appellant owned within the boundary fixed by the fence, with the exception of certain lots, the location of which was pointed out, providing the vendor should ascertain that they had been conveyed by him to others. The agreement left the excepted lots to be determined by appellants. This they assumed to do honestly and correctly, and to execute a deed in accordance with the terms of the contract. It is immaterial whether there was fraudulent intent on the part of the vendors on May 5, or in the execution of the deed on May 7; it is sufficient that it would be a fraud on the part of the vendors not to fulfil their agreement, it being within their power to do so according to its terms.

In the case of *Lingeman v. Shirk* (1896), 15 Ind. App. 432, the court said: "Such a contract, where the lands are to be thus selected by one party, is a valid and enforceable contract, upon the ground that although the lands are not specifically described, there is a definite mode of ascertaining them prescribed in the contract, and thus that which would otherwise be uncertain may be made certain." See, also, *Tewksbury v. Howard* (1894), 138 Ind. 103; *Leslie v. Merrick* (1885), 99 Ind. 180; *Roehl v. Haumesser* (1888), 114 Ind. 311; *Howard v. Adkins* (1906), 167 Ind. 184; *Maris v. Masters* (1903), 31 Ind. App. 235. The complaint was sufficient.

Under the assignment relating to the motion for a new trial, it is claimed on behalf of appellants that the evidence showed that the land conveyed by deed of appellants

2. was worth the price paid by appellee, and that therefore the charge of fraud was not supported. The evidence concerning the valuation of the land conveyed was indefinite, but if it had been sufficient for the court to determine that the price agreed upon was less than the market value, this fact alone would not uphold appellants in refusing to convey all the land embraced in the contract, and possession of which was delivered thereunder. *Hamilton v. Hamilton* (1904), 162 Ind. 430. Where land is the subject of a contract of sale, jurisdiction to award

3. specific performance is well established, and mere inadequacy of price is not of itself a defense, but is objectionable, only so far as it furnishes satisfactory evidence of fraud as a fact. Pomeroy, *Contracts* (2d ed.), §192 *et seq.*

Upon the evidence before us the court might well conclude that appellants were seeking to defraud appellee, and, without the interposition of the equitable remedy, would

4. do so. The record discloses abundant evidence in support of the decision of the trial court.

Judgment affirmed.

INDIANAPOLIS AND NORTHWESTERN TRACTION
COMPANY v. NEWBY, ADMINISTRATOR.

[No. 6,564. Filed December 7, 1909. Rehearing denied March 11, 1910.]

1. RAILROADS.—*Interurban.*—*Highway Crossings.*—*Negligence.*—*Complaint.*—A complaint alleging that the plaintiff's decedent was driving along a public highway, that defendant interurban railroad company negligently ran one of its cars, without signal, over the crossing, thereby killing such decedent, that the death was caused solely by reason of such negligence, shows to the ordinary person that the decedent was upon the highway and that defendant's negligence was the cause of his death. p. 542.
2. PLEADING.—*Complaint.*—*Test of.*—The test of the sufficiency of a complaint is whether a person of ordinary understanding can know what was intended thereby, and not whether an extraordinarily acute mind can distort the meaning into something different. p. 543.
3. APPEAL.—*Briefs.*—*Waiver.*—Points not discussed are waived. p. 543.
4. RAILROADS.—*Damages.*—*Evidence.*—*Earnings of Decedent.*—In an action for damages for the death of a person, evidence of "what the earnings of [decedent] would be a year, including and up to" the time of his death, is admissible, the net earnings being the proper standard in estimating the damages. p. 543.
5. RAILROADS.—*Interurban.*—*Negligence.*—*Evidence.*—*Highway Crossing Signals.*—*Custom of Steam Railroads.*—In an action against an interurban railroad company for negligently killing plaintiff's decedent, because of failure to give a highway crossing signal, evidence as to the custom of steam railroad companies as to the giving of such signals, is inadmissible. p. 544.
6. RAILROADS.—*Interurban.*—*Instructions.*—*Proof of Complaint.*—*Failure to Set Out Allegations.*—An instruction that the burden is upon the plaintiff to prove the allegations of his complaint, without setting them out, is not improper. p. 544.
7. RAILROADS.—*Interurban.*—*Damages.*—*Instructions.*—*Considering Evidence.*—An instruction, in an action for death by wrongful act, that if the jury should find for the plaintiff, it should award such damages as in its judgment would fairly compensate his decedent's widow and children, if any, dependent upon decedent for support, not exceeding the amount demanded, does not prescribe an improper measure of damages, nor invite an amount not warranted by the evidence. p. 545.

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8. **DAMAGES.—Excessive.—Verdict.—Consideration of Evidence.**—A verdict for \$5,000, for the negligent killing of a man forty-seven years old, earning \$1,000 per year, affirmatively shows that the jury did not go outside of the evidence in determining the amount of damages. p. 546.
9. **TRIAL.—Instructions.—Answers to Interrogatories.—Evidence.**—An instruction, in an action for death because of negligence, against an interurban railroad company that if, as to any interrogatory, there is no evidence, or not sufficient evidence, the answer should be "No evidence." or "Not sufficient evidence," is not necessarily harmful to defendant, the answer being legally equivalent, both being a finding against the party having the burden of proof. p. 546.
10. **TRIAL.—Interrogatories.—Insufficient Answers.—Remedy.**—The remedy for an imperfect answer to an interrogatory to the jury, is a motion to require a complete answer. p. 547.
11. **RAILROADS.—Interurban.—Failure to Give Highway Crossing Signal.—Interrogatories.—Harmless Error.**—In an action against an interurban railroad company for death caused by an alleged failure to give a highway crossing signal, the answer "Not sufficient evidence," to an interrogatory as to whether a signal was given 1,000 feet from the crossing, is not controlling, since neither an affirmative nor a negative answer would have required a judgment for defendant, the question of negligence still remaining for the jury. p. 547.
12. **RAILROADS.—Interurban.—Highway Crossing Accident.—Evidence.—Question for Jury.**—Where defendant's car, running in a deep cut, approached a highway crossing, and the plaintiff's decedent was approaching the crossing from the same direction, the atmosphere being foggy, and decedent being unable to see the car more than one hundred feet, the questions of defendant's negligence and plaintiff's contributory negligence are for the jury, where the evidence as to the giving of the proper signal is conflicting. p. 548.
13. **COURTS.—Appellate.—Decisions.—Duty to Set Out Record for Transfer to Supreme Court.**—The Appellate Court is under no duty to set out, in its opinion, the record presenting every point discussed in order that the losing party may present such question to the Supreme Court on a petition to transfer. p. 549.
14. **COURTS.—Appellate.—Decisions.**—The Appellate Court is not required to write an opinion in affirming a case. p. 550.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Melvin Newby, as administrator of the estate of Peter Cruse, deceased, against the Indianapolis and North-

Indianapolis, etc., Traction Co. v. Newby—45 Ind. App. 540.

western Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. S. Christian and W. H. Latta, for appellant.

Kane & Kane and Gavin & Davis, for appellee.

HADLEY, J.—Appellee sued appellant for the negligent killing of appellee's decedent, Peter Cruse, at a highway crossing on appellant's line of railroad.

The complaint is in one paragraph, and after fully describing the highway and the railroad at the point of intersection, and the surrounding country, proceeds as follows: "That on March 20, 1905, plaintiff's decedent, said Peter Cruse, was driving westward upon said highway toward the town of Zionsville, in a buggy drawn by one horse; that defendant on this occasion negligently and carelessly ran one of its electric cars toward, across and over said crossing at the highly dangerous rate of sixty miles an hour, and carelessly and negligently failed to give any signal or warning of its approach to said crossing, so that, as a consequence of and solely by reason of said negligence of said defendant, it carelessly and negligently ran its said car over and against said buggy in which plaintiff's decedent was riding, and over and against said plaintiff's decedent, whereby plaintiff's decedent was crushed, bruised, mangled and thrown a distance of 100 feet and instantly killed."

To this complaint a demurrer was filed, which was overruled. This ruling is assigned as error. Appellant asserts

that this complaint is defective, for the reason that it

1. does not allege that at the time decedent was injured he was upon the public highway. In our opinion the complaint is not defective for this reason. It states that decedent was traveling westward upon said highway, and that appellant, at that time, negligently and carelessly ran one of its electric cars over said crossing, so that as a consequence of and solely by reason of said negligence of appellant, said car ran against said buggy, thereby killing ap-

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pellee's decedent. We do not think it possible that a person of ordinary understanding could fail to know what was intended by this language, and this is all that is required by the statute. Our practice should not and does not re-

2. quire that a complaint should so state facts that an extraordinarily acute mind may not evolve from it a meaning that is clearly not intended, and is contrary to a reasonable interpretation of its averments. Furthermore, the complaint states that the injury was caused as a consequence of and solely by reason of the negligence of appellant. In the absence of a motion to make more specific, and in the light of the other averments, this is a sufficient charge of actionable negligence. The complaint was therefore sufficient. Upon the trial of the cause a verdict was returned in favor of appellee. With its general verdict the jury returned answers to interrogatories. Appellant moved for a judgment on the interrogatories, which motion was overruled. It then presented a motion for a new trial, which motion was also overruled.

Both of these rulings are assigned as error, the first, however, is not discussed, and is therefore waived. Under the exceptions to the ruling on the motion for a new trial,

3. appellant presents many questions, the first of which is the admission of the testimony of Thomas Hussey, over appellant's objection, the objectionable question

4. being: "You may state to the jury what the earnings of Mr. Cruse would be a year, including and up to March 20, 1905, the date he was killed, from his business; his farm as he conducted it, as you knew that he conducted it." It is urged against this question that it calls for the gross earnings of the decedent, and includes whatever property he owned or leased in making that gross income, which property is not lost by his death, and which it is not proper to consider in determining his earning capacity. We do not think the question subject to the objection urged. It clearly asks the witness to state what Mr. Cruse earned; not what his

farm produced, but what his services were worth as a farmer, and it was proper to include in this estimate his capacity as a farmer. Certainly his services were worth more if he was a good farmer than if he was a poor one. It appears from the record that, upon further examination of the witness, in answering the question he had included therein the rental value of the farm and other matters not proper to be considered; but in this further examination the witness clearly made the separation of the proper from the improper, and testified explicitly as to the net earning capacity of decedent, which he put at \$1,000 a year. There was no reversible error in this ruling.

Appellant also objects to the refusal of the court to permit a witness of appellant, upon direct examination, to testify as to whether there was in this State a customary

5. signal used by steam railroad engines when approaching public highway crossings. We fail to see any relevancy of this testimony to the case at bar. Appellant did not conduct a steam railroad, decedent was not killed by an engine or train on the steam railroad, and a custom of a steam railroad could and should have no bearing upon the questions in issue. There was no claim that decedent did not know the highway crossing signal of either the interurban or steam railroad when he heard it. The evidence was properly excluded.

Objection is made to instruction two, upon the request of appellee. By this instruction the jury was told that by the general denial of appellant the burden was

6. upon appellee to prove the material allegations of the complaint by a fair preponderance of the evidence; and if appellee had so proved such material allegations, then he was entitled to recover such damages as would compensate the widow and children for the injuries sustained, not exceeding the amount demanded in the complaint, unless it appeared from the evidence that decedent was guilty of negligence contributing to his death. The objections to this in

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struction are twofold: (1) It is urged that the instruction is erroneous, for the reason that it authorizes recovery on proof of the material allegations of the complaint, without specifying what the material allegations are; (2) that it is erroneous in the measure of damages, in that it does not limit the jury to the evidence nor the law. The first contention of appellant is decided adversely to it in the following cases: *New Castle Bridge Co. v. Doty* (1907), 168 Ind. 259; *Louisville, etc., R. Co. v. Grantham* (1885), 104 Ind. 353.

We will consider the second proposition together with the sixteenth instruction given by the court, which is as follows:

"If you find for plaintiff, you will award such dam-

7. ages as in your judgment will fairly compensate his widow and children, if any, dependent on him for support, not exceeding the amount named in the complaint."

The proposition here laid down in general terms is correct. Taken together, the jury is told that it shall only give damages compensating decedent's dependents for their loss, which implies pecuniary loss. If the instruction was not as specific and clear as appellant desired upon this question, it was its duty to ask for a more definite and explicit statement and definition. *New Castle Bridge Co. v. Doty*, *supra*; *Louisville, etc., R. Co. v. Grantham*, *supra*; *Indianapolis, etc., Traction Co. v. Henderson* (1906), 39 Ind. App. 324; *Cincinnati, etc., R. Co. v. Smock* (1893), 133 Ind. 411; *DuSouchet v. Dutcher* (1888), 113 Ind. 249; *Crum v. State* (1897), 148 Ind. 401. This, appellant did not do. All of the instructions asked by appellant were given by the court. Neither are said instructions open to the objection that the jury is thereunder warranted in determining the damages aside from the evidence in the case. *Indianapolis, etc., Traction Co. v. Henderson*, *supra*; *City of Indianapolis v. Scott* (1880), 72 Ind. 196; *Louisville, etc., R. Co. v. Falvey* (1886), 104 Ind. 409. In the case last cited, after setting out elements of damages, the instruction under consideration contained these

words: "And the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries, or any of them, thus sustained." Speaking of the objection to this language, the court say: "One of the objections urged to this instruction is, that it does not require the jury to assess the damages from the evidence in the case. There is no force in this objection. No juror of average intelligence could fail to understand that the court directed him to be guided by the evidence."

Furthermore, in a large number of instructions given in this case, the jury was told, over and over again, that its finding should be from the evidence in the case. The

8. verdict of \$5,000 for the death of a man forty-seven years of age, who had an earning capacity of \$1,000 a year, clearly shows that the jury did not go outside of the evidence in rendering its verdict. There was no reversible error in the giving of this instruction.

Appellant urges an objection to instruction two, given by the court on its own motion, which is as follows: "If as to any fact inquired there is no evidence, or not sufficient

9. evidence, as to such interrogatory you will answer, 'No evidence,' or 'Not sufficient evidence,' or you may answer them against the party having the burden of proof." This instruction is not to be commended. If there is no evidence to support an answer to an interrogatory, it is proper for the jury to answer, "No evidence," or to answer the interrogatory against the party having the burden of proof, and "Not sufficient evidence" is the same as "No evidence," and its repetition, as in the instruction before us, can serve no useful purpose, but we fail to see how appellant has been harmed. If it was necessary to sustain appellee's case for him to prove a certain fact, the finding, "Not sufficient evidence" was against appellee. If, however, it was essential to appellant's defense for it to prove a certain fact, and the burden was upon it so to prove, the answer of "Not sufficient evidence" to an interrogatory on that point is a finding

against it. In the latter case, if appellant was of the opinion that the interrogatory had not been answered, or had

10. not been answered with sufficient definiteness, its remedy was by motion to require the jury so to answer before being discharged. *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435; *Pittsburgh, etc., R. Co. v. Hixon* (1887), 110 Ind. 225. No such motion was presented by appellant. Furthermore, the instruction does not lay

11. down any principle of law governing the merits of the case. According to appellant's contention, the only answer to an interrogatory, that was influenced by this instruction, was the seventh, as to whether the crossing signal was given 1,000 feet from the crossing, to which the jury answered, "Not sufficient evidence." This is the same as if the interrogatory had been unanswered. *Albany Land Co. v. Rickel* (1904), 162 Ind. 222. It is apparent that if the jury had answered this interrogatory in either the affirmative or negative, as it should have been required to do, this would not have required a judgment for appellant. The jury might well have determined, under all the circumstances of the case, considering the rate of speed, the fogginess of the weather and the character of the crossing, that such a signal was not sufficient to relieve appellant from the charge of negligence. The error, if any, in giving said instruction is not reversible. Numerous objections are raised to other instructions given. We have carefully considered these questions and examined the authorities cited by appellant, and find that the objections are not sustained by the authorities. The instructions were very full, comprising instructions asked by appellee and instructions asked by appellant. They fully informed the jury as to their duties and as to the principles of law involved in the consideration of the cause, and it would be unprofitable to take up each question and separately discuss it, as many of the objections urged have been long since settled against the contention of appellant by the decisions of this court and the Supreme Court.

It is finally claimed that the evidence does not support the verdict. Upon all points on the question of negligence the evidence is conflicting. There was evidence to the

12. effect that the crossing of the highway with the railroad was at an angle so acute that at a distance of fifty feet back from the center of the crossing the center of the highway, at a right angle from the railroad, was only eighteen feet from the center of said railroad. Six hundred feet back from said crossing is a barn, between the railroad and the highway. The railroad and the highway run through a cut twelve feet deep. All the way from said barn to within a very short distance of said crossing the ground between the highway and the railroad is high. At no point from the highway, fifty feet from the center of the crossing back to where said barn stands, can a person see an approaching car upon the track opposite or back of him. Sixty feet from the crossing, on clear days, a car can be seen on the track four or five hundred feet to the east. At twenty-six feet from the crossing a car can be seen about the same distance. The car was about three hundred feet away when decedent's horse began to enter upon the track, both were proceeding westward. The car was running at fifty miles an hour when the collision occurred. The horse was traveling three or four miles an hour. Both decedent and the man with him commenced looking and listening for the car when they were seventy-five or one hundred feet from the crossing, and continued to do so until the horse reached the track. There was evidence that persons on the car and persons in the vicinity of the car did not hear any crossing signal before they heard the alarm signal, which was given an instant before the collision occurred. There was no evidence that the crossing signal was given at the minimum statutory distance. There was evidence that it was given 1,000 feet from the crossing, but neither decedent nor his companion heard any signal or knew that a car was approaching. The atmos-

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phere was foggy at the time, and before the collision one could not see distinctly over one hundred feet.

In this state of the evidence, we cannot say, as a matter of law, that appellant was not guilty of negligence; neither can we say, as a matter of law, that appellee's decedent was not exercising due care and was guilty of negligence contributing to his injury, these questions being, under the circumstances clearly questions of fact for the determination of the jury. *Pittsburgh, etc., R. Co. v. Lynch* (1909), 43 Ind. App. 177. We find no reversible error in the record.

Judgment affirmed.

ON PETITION FOR REHEARING.

HADLEY, J.—Appellant has very earnestly, but courteously, insisted that this court should grant a rehearing and write another opinion, setting out the instruc-

13. tions which were considered and passed upon, without giving any extended discussion in support of our reasons for our decision thereon. Appellant claims this as a right, on the theory that it is entitled to have the questions on these instructions reviewed by the Supreme Court, on a petition to transfer. In this, however, appellant is laboring under a misconception of the transfer act. It has been held repeatedly by this court and the Supreme Court that the purpose of that act was to maintain uniformity of decisions for the benefit of the public, and whatever additional rights it granted to the litigant were incidental. *United States Cement Co. v. Cooper* (1900), 172 Ind. 599; *Barnett v. Bryce Furnace Co.* (1901), 157 Ind. 572; *Klein v. Nugent Gravel Co.* (1904), 162 Ind. 509; *Cleveland, etc., R. Co. v. Van Natta* (1909), 44 Ind. App. 608.

In the case last cited the question here involved is fully discussed and determined. As is there said in the affirm-

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ance of a case, the law does not require us to write
 14. any opinion whatever, and, as between the litigants,
 our decisions are final, unless in the interest of the
 public they should be set aside. We have reëxamined the
 instructions referred to, and it seems so clear that no avail-
 able error is presented thereon that we can see no useful
 purpose in setting them out or discussing them.

Petition for a rehearing is denied.

WESTERN UNION TELEGRAPH COMPANY v.
 KLITZKE ET AL.

[No. 6,502. Filed October 14, 1909. Rehearing denied March
 11, 1910.]

1. TELEGRAPHS AND TELEPHONES.—*Statutes.—Penalties.—Com-
 plaint.*—Under §5783 Burns 1908, §4178 R. S. 1881, providing that
 telegraph companies, under penalty, shall deliver all messages, if
 the addressee lives "within one mile of the telegraphic station or
 within the city or town in which such station is," a complaint to
 recover such penalty must allege that such addressee lives within
 one mile of the defendant's office, or within the city or town.
 p. 552.
2. TELEGRAPHS AND TELEPHONES.—*Contracts.—Penalties.*—Tele-
 graph companies may lawfully contract to deliver messages at a
 greater distance from their offices than those prescribed by
 §5783 Burns 1908, §4178 R. S. 1881, and for a failure to deliver
 such messages the statutory penalty attaches. p. 553.
3. TELEGRAPHS AND TELEPHONES.—*Penalties.—Statutes.*—The pen-
 alty provision of the act of 1885 (Acts 1885, p. 151, §3) applies to
 the statute requiring certain messages to be delivered (§5783
 Burns 1908, §4178 R. S. 1881). p. 553.
4. TELEGRAPHS AND TELEPHONES.—*Delivery of Messages.*—A tele-
 graph company cannot be compelled to deliver a message, into
 the country, three miles from its office, unless it contracts to do so.
 p. 553.

From Lake Superior Court; *Harry B. Tuthill*, Judge.

Action by Louis Klitzke and others against the Western
 Union Telegraph Company. From a judgment for plain-
 tiffs, defendant appeals. *Reversed.*

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Pickens, Moores, Davidson & Pickens, George H. Fearons and Virgil S. Reiter, for appellant.

Stinson Bros., for appellees.

WATSON, J.—Appellees, as partners under the firm name of Klitzke Bros., commenced this action against appellant, to recover the statutory penalty prescribed by §§5780, 5781 Burns 1906, Acts 1885, p. 151, §§1, 3, and for damages which were claimed to have grown out of the failure of appellant to deliver the following telegram sent by appellees:

“Hammond, Indiana, January, 1906.

Miss Julia Ludwig,
Saint John, Indiana.

Will take that milk at once, starting to-morrow.

Answer, our expense.

Klitzke Bros.”

The complaint, in part, is as follows: Plaintiffs further aver that at the time said dispatch was so received by defendant company at said city of Hammond, and at the time plaintiffs so paid said defendant for transmitting said dispatch as aforesaid, and for three years prior to said time, Miss Julia Ludwig resided in the country near the town or village of Saint John, Lake county, State of Indiana; that, on account of the nondelivery of the telegram, these plaintiffs were damaged in the sum of \$25; that, by reason of the delay and neglect, said defendant has violated its statutory duty and has incurred the statutory penalty of \$100, and, by reason thereof, the plaintiffs have been damaged in the sum of \$125, and are entitled to recover the sum of \$125.” To this complaint appellant filed its answer in two paragraphs: (1) A general denial, and (2) affirmatively alleging that the addressee lived more than one mile from the telegraph office at Saint John, and more than one mile from the corporate limits of said town.

In reply to the second paragraph of answer the appellees filed their answer in general denial. Upon the trial a verdict for \$109 was returned in favor of appellees. The court

overruled appellant's motion for a new trial, and rendered judgment on the verdict, from which judgment this appeal is prosecuted.

The errors assigned are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) The Lake Superior Court erred in overruling defendant's motion to instruct the jury to return a verdict for defendant; (3) The Lake Superior Court erred in overruling defendant's motion for a new trial.

Two of the reasons assigned for a new trial are that the verdict is not sustained by sufficient evidence and that it is contrary to law.

The complaint discloses the fact that the addressee of the message, which is the subject of this controversy, lived in the country outside of the town of Saint John, where the telegraph office was located, which was the terminal office.

Section 5783 Burns 1908, §4178 R. S. 1881, is as follows: "Such companies shall deliver all dispatches, by a messenger, to the persons to whom the same are addressed, or to their agents on payment of any charges due for the same: Provided, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is."

The complaint does not aver that the addressee lived within one mile of the telegraph office or the limits of the town of Saint John. It does aver, however, that she

1. resided near the town. "Near" is a relative term.

and its precise import can only be determined by the surrounding facts and circumstances in the case in which it is used. The averment therefore does not meet the requirements of the statute. Under the foregoing section it is necessary to aver that the addressee lived within one mile of the telegraph office, or within the corporate limits of the town. *Reese v. Western Union Tel. Co.* (1890), 123 Ind. 294, 298, 299, 7 L. R. A. 583; *Moore v. Western Union Tel. Co.* (1891).

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87 Ga. 613, 13 S. E. 639. The appellant sent the message subject to the terms on the back thereof, which are as follows:

“All messages taken by this company are subject to the following terms: * * * Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.”

This was a part of the contract, and is added to the statute, before quoted, governing the delivery of dispatches, which is incorporated into and made a part of the contract.

2. There can be no statutory penalty liability for failure to deliver a message to an addressee when he resides beyond the limits prescribed by statute, unless there be a special provision made by the sender for such delivery. *Reese v. Western Union Tel. Co.*, *supra*; *Western Union Tel. Co. v. Harvey* (1903), 67 Kan. 729, 74 Pac. 250; *Moore v. Western Union Tel. Co.*, *supra*.

That the penalty statute (§5781, *supra*) is applicable to the statutes of 1852 (§5783, *supra*) has been so declared by the Supreme Court and this court, and they must necessarily be construed together, so that it is unnecessary further to comment on this question. *Reese v. Western Union Tel. Co.*, *supra*; *Western Union Tel. Co. v. Sefrit* (1906), 38 Ind. App. 565.

Upon the trial of this cause it was shown without contradiction that the addressee lived three miles distant from the terminal office and the town limits of Saint John, and

4. hence there could be no recovery of the statutory penalty, since it was not shown that arrangements had been made to pay the extra charge for the delivery of the telegram the extra distance beyond the statutory limits. On the contrary, it was admitted that no such arrangements had been provided for. With the views that we have herein expressed with reference to this complaint, it is unnecessary to consider further errors assigned.

The judgment is reversed, and the cause is therefore remanded to the trial court, with instructions to sustain the motion for a new trial and for further proceedings not inconsistent with this opinion.

INDIANA NATURAL GAS AND OIL COMPANY v.
STEWART.

[No. 6,571. Filed January 6, 1910. Rehearing denied March 15, 1910.]

1. PLEADING.—*Complaint.—Theory.—Changing of, on Appeal.*—The theory of a complaint adhered to in the trial court cannot be changed on appeal. p. 556.
2. CONTRACTS.—*Gas and Oil.—Breach.—Election.—Complaint.*—A complaint for rentals, under a contract providing that the plaintiff "shall have, free of expense, gas, * * * to light and heat the dwellings on the premises, * * * free of cost, within one day from this date, or in lieu thereof, the sum of \$20 yearly in advance," need not allege that the leased premises had dwellings thereon, the contract giving to the plaintiff an option to take either the gas, or the rental. pp. 556, 560.
3. CONTRACTS.—*Gas and Oil.—Breach.—Complaint.*—A complaint for rentals under a gas and oil contract for the year ending February 12, 1906, alleged to have been demanded under a contract executed February 13, 1899, the contract providing that "a well shall be drilled within two years from this date, or the royalty [\$100, annually] paid to first party," is sufficient, where it shows that no well has been sunk, the date of the contract showing that the first two years have expired. p. 557.
4. CONTRACTS.—*Gas and Oil.—Construction.*—A gas and oil contract providing in clause one that a well shall be sunk within twelve months, or there shall be paid "a yearly rental of \$30 in advance until said well is drilled," and in clause three, that "should gas be found, second party agrees to pay to first party \$100, yearly" for each used well, and in clause four, that free gas shall be furnished to the owner, "or in lieu thereof, the sum of \$20 yearly in advance," and in clause seven, that "a well shall be drilled within two years from this date, or the royalty paid to first party," gives the royalty under clause three only when a well is used, gives the royalty of \$100 yearly, when no well is

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sunk within two years, and gives the rental of \$30 under clause one until a well is sunk, after which clause one is superseded by clause four, giving free gas, or the rental of \$20, yearly. pp. 557, 558, 561.

5. CONTRACTS.—*Construction.—Parts.*—Contracts, where possible, will be construed so as to give effect to all parts thereof. p. 558.
6. CONTRACTS.—*Operation of.*—"Within One Day from this Date."—The words "within one day from this date," as used in a gas and oil contract providing that the landowner should have gas, "free of cost, within one day from this date, or in lieu thereof, the sum of \$20, yearly, in advance," refer to the date of the completion of a well, and not to the date of the contract. p. 559.
7. CONTRACTS.—*Construction.—Ambiguities.*—Where a contract is ambiguous, the circumstances will all be considered as well as the construction placed thereon by the parties themselves, in determining the true meaning thereof. p. 559.
8. WORDS AND PHRASES.—"Royalty."—*Gas and Oil Contracts.*—The word "royalty," as used in gas and oil contracts, ordinarily imports a share of the product or profit reserved by the owner for permitting another to use the property. p. 560.

From Blackford Circuit Court; *Charles E. Sturgis*, Judge.

Action by Martha E. Stewart against the Indiana Natural Gas and Oil Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. O. Johnson, Blackledge & Wolf and *J. A. Hindman*, for appellant.

A. R. Long and *L. F. Sprague*, for appellee.

MYERS, C. J.—Appellee brought this action against the appellant to recover rentals and royalties alleged to be due on account of a certain gas lease dated February 13, 1899. That part of the lease pertinent to the questions here to be considered reads as follows:

"(3) Should gas be found, second party agrees to pay to first party \$100, yearly, payable on demand, for each and every well from which gas is transported or used off the premises, so long as the same is so transported.

(4) First party shall have, free of expense, gas from the well or wells to use, at his own risk, to light and heat the dwellings on the premises, with pipe to

conduct the same to said dwelling, free of cost, within one day from this date, or, in lieu thereof, the sum of \$20, yearly, in advance. * * *

(7) Second party may, at any time, reconvey this grant, and thereupon this instrument shall be null and void. A well shall be drilled within two years from this date, or the royalty paid to first party."

The complaint was in two paragraphs: The first was based upon clause four of the lease, and the second was based upon clauses three and seven.

A demurrer to each of these paragraphs was overruled, and these rulings are assigned as error.

The only objection urged against the first paragraph is that it does not allege that, during the time sued for in said paragraph, there were dwellings of any kind or character on the premises leased.

The single criticism urged against this paragraph does not call for a construction of that clause of the contract upon which it was based. It proceeded upon the theory that clause four stipulated a rental which had not been paid for the years ending February 13, 1905 and 1906. Such was its theory in the lower court, and this theory must be

1. adhered to on appeal. *Studabaker v. Faylor* (1908), 170 Ind. 498; *Conrad v. Hansen* (1908), 171 Ind. 43; *Zeller, McClellan & Co. v. Vinardi* (1908), 42 Ind. App. 232, and cases cited. The question, therefore, is, Was it
2. necessary for the appellee to allege and prove that, during the time for which cash rental was demanded, dwellings were maintained upon the leased premises? Clause four stipulates that "first party shall have," under certain conditions, free gas to light and heat the dwellings on the leased premises, or, in lieu thereof, the sum of \$20 yearly, in advance. By this paragraph appellee sought to collect money rental alleged to be due under that clause of the contract, and not damages because of appellant's failure to furnish gas. Appellee had one of two options—free gas, or, in lieu thereof, money rental, and the latter was demanded.

Whether there were any buildings on the premises is of little importance to appellant, in case money rental was to be paid. Of course appellee was not entitled to both free gas and money rental, and it is alleged that appellant did not furnish the gas. While the allegations of fact in this paragraph are not without some imperfections, yet there is no fact wholly omitted that is necessary to state a cause of action, and it was not, therefore, error to overrule the demurrer for want of facts to this paragraph.

The second paragraph shows that appellee, at the time of the commencement of this action, and continuously since the execution of said lease, was the owner of the leased

3. land; that no well or wells had ever been drilled upon said premises, and it does not appear that the premises had been reconveyed. Appellee sought by this paragraph to enforce the payment of \$100, as royalty for the year ending February 12, 1906. It appears from a general allegation that all payments on account of royalty had been paid up to February 12, 1905. It clearly appears that more than two years had elapsed between the making of the lease and the year for which appellee sought to collect \$100 as royalty. Appellant had two years in which to drill a well; but, under the terms of his contract with appellee, the \$100 a year royalty, after that time, it was bound to pay whether it put down a well or not. This sum was payable on demand, and appellee alleged that on demand appellant refused to pay the royalty past due.

Appellant insists that under the lease there is nothing due to appellee for the year ending February 13, 1906, because under clause three of the lease a royalty of \$100 per

4. annum was to be paid for each gas well from which gas was transported off of the premises, and as no well or wells had been drilled, therefore, it follows that no royalty was due under the third clause of the lease, nor was there anything due under the stipulation in the seventh clause that "a well shall be drilled within two years from this

date, or royalty paid to first party," because, under this provision, if at the end of the second year no well had been drilled, then appellant was to pay royalty that would have been then due if a well had been put down, or, in other words, that it does not mean that \$100 royalty each year after the second year shall be paid if a well is not drilled, for it is claimed that such a construction of the lease would destroy the first clause, which provides for a well upon the premises within twelve months from the date of the lease, or thereafter the second party agrees to pay first party "a yearly rental of \$30 in advance until said well is drilled."

It is a familiar rule that a contract should be

5. so construed as to render all its parts operative, if it can be done.

The questions raised affecting the sufficiency of the paragraph now under consideration seem to require from us some expression regarding the construction to be

4. placed upon the lease in question. It is evident from clause four that the gas to light and heat the dwellings on said premises was to come from the proposed well or wells. There is nothing in the lease or facts shown in this paragraph from which it can be said that the parties had in mind anything else at the time of its execution. There were no wells on the premises, nor does it appear that any gas had been found in that vicinity, nor that appellant was then engaged in transporting gas. So, by this provision, appellee was entitled to free gas for the purpose therein mentioned, or, in lieu thereof, \$20 yearly in advance, but neither of these options was effective until a well was sunk on the leased premises. As we have seen by clause one, appellant was to pay a yearly rental of \$30 in advance until a well was drilled. This latter provision was not limited to one or two years, but was to continue "until said well is drilled." The provision in clause one, with the provision in clause four to furnish gas, or, in lieu thereof, to pay the sum of \$20 yearly in advance, provides for a rental before a well

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was drilled, and afterwards free gas or, in lieu thereof, \$20 yearly in advance. Or, in other words, after a well was drilled clause four was to take the place of clause one. The words "within one day from this date" must be con-

6. sidered with reference to the particular subject then under consideration—the rental after gas was found—and not to the date of the contract, for it is conceded by all that a well could not be put down within one day from the date of the contract. The rule is that where a contract is ambiguous, the situation of the parties and the facts

7. and circumstances may be considered in determining the actual intent and meaning of the parties, as expressed by the language used. The contract as made is the one to be enforced. *Indiana Nat. Gas, etc., Co. v. Hinton* (1902), 159 Ind. 398; *Merica v. Burget* (1905), 36 Ind. App. 453, and cases cited; *Kokomo Nat. Gas, etc., Co. v. Albright* (1897), 18 Ind. App. 151; *Uinta Tunnel, etc., Co. v. Ajax Gold Mining Co.* (1905), 141 Fed. 563, 73 C. C. A. 35. It is also true "that when the terms of a contract are of doubtful or ambiguous meaning, the construction placed on same by the parties, by their conduct and acts, may be shown for the purpose of arriving at their true intention. The construction placed on such a contract by the parties is entitled to great weight and may be controlling. * * * When, however, the contract is free from ambiguity and its meaning is clear, such rule is not applicable." *Ralya v. Atkins & Co.* (1901), 157 Ind. 331. See, also, *Scott v. LaFayette Gas Co.* (1908), 42 Ind. App. 614. Clause three provides for the payment of \$100 yearly for each well from which gas is transported or used off of the premises. In this clause the payment of \$100 is not designated as rent or royalty, but in clauses one and four the payments there provided for are designated as "yearly rental" in the former, and in the latter free gas to light and heat the dwellings on the premises, or, in lieu thereof, the sum of \$20 yearly in advance. In neither of these two clauses can it be said that the

parties intended the payments to be made to be understood as a royalty, as that word is commonly understood and used in contracts of the nature of the one before us. The word "royalty," as used in the seventh clause, generally

8. has reference to "a share of the product or profit reserved by the owner for permitting another to use the property. Webster's Dict. Under the lease in question, the share of the product or the profit is represented by a yearly payment of \$100 "for each and every well from which gas is transported or used off of the premises," so that clauses three and seven construed together gave to appellant two years from the date of the contract in which to drill a well, or thereafter, upon demand to pay to appellee \$100 yearly. These two clauses have reference to a subject separate and apart from the matter disposed of in clause one. The parties to the lease, having by their acts and conduct given to clauses one and four a different construction from that here indicated, should and will be held to the construction which they have placed upon them. The ruling on the demurrer to the second paragraph was not erroneous.

Appellant's motion for a new trial was overruled, and this ruling is assigned as error. In support of this error, appellant insists that there was no evidence of any dwelling or dwellings upon the premises during the time covered by the first paragraph; that the decision of the court was not supported by sufficient evidence; that there was no proof that gas was in or under the premises to be developed during the year sued for in the second paragraph, or that appellant had not made tests in good faith or exercised its judgment that there was no gas to be developed.

What we have said with reference to the demurrer to the first paragraph of the complaint is a sufficient answer to appellant's first reason in support of its motion. We

2. are also of the opinion that the evidence supports the decision of the court. While there was no evidence to

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the effect that gas actually existed beneath the surface

4. of the premises leased, or that appellant had not made tests, or had not in good faith exercised its judgment that there was no gas to be developed under the leased premises, under the theory of each paragraph of the complaint, such evidence was unnecessary in order for appellee to make out her case.

Judgment affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. TOWN OF REMINGTON.

[No. 6,824. Filed November 3, 1909. Rehearing denied March 15, 1910.]

1. RAILROADS.—*Easements.—Depots.—Access to.—Injunction.—Decree.*—A decree in a suit to enjoin a town from exercising any rights over a railroad right of way, providing that “neither party shall erect any barriers between Ohio street and Indiana street to prevent free access to the depot or streets,” does not prevent the company from enclosing all parts of such right of way that are not portions of streets. p. 563.
2. RAILROADS.—*Depots.—“Free Access” to.—Injunction.—Decree.*—A decree providing that a railroad company shall not erect any barriers that will prevent “free access” to its depot or to the streets, is not violated where the enclosures do not interfere with the streets which lead to such depot. p. 564.
3. INJUNCTION.—*Violating Decree.—Railroads.—Access to Depots.—Complaint.*—A complaint alleging that in a prior suit defendant railroad company was ordered not to erect any obstruction which would prevent free access to its depot, and that such company has erected an enclosure which does prevent such access, is sufficient. p. 565.
4. APPEAL.—*Rehearing.—Questions Presentable.*—Questions not presented in the original brief cannot be entertained on a petition for rehearing. p. 565.
5. RAILROADS.—*Depots.—“Free Access.”—Decree.*—A decree requiring a railroad company not to obstruct the “free access” to its depots, requires not only access, but also that such access shall not be in any manner obstructed. p. 565.

From Jasper Circuit Court; Charles W. Hanley, Judge.

Pittsburgh, etc., R. Co. v. Town of Remington—45 Ind. App. 561.

Suit by the Town of Remington against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a decree for plaintiff, defendant appeals. *Reversed.*

G. E. Ross, for appellant.

Jasper Guy, for appellee.

HADLEY, C. J.—This was a suit brought by appellee against appellant to restrain and enjoin it from fencing certain portions of its right of way in the town of Remington. It appears that appellant originally owned a right of way 150 feet wide extending east and west through said town; that appellant's tracks were laid and trains operated thereon through the center of said strip; that said right of way intersected Main, New York, Ohio, Indiana, Illinois and Kentucky streets, which streets extended north and south through said town; that between Ohio and Indiana streets appellant had its depot and buildings, which were located on the south side of appellant's track on said right of way; that between said Ohio and Indiana streets buildings were erected facing said right of way; that prior to November 19, 1901, the public had used a portion of said right of way on each side of appellant's tracks from Ohio street east to the corporation limits in front of said buildings; that at said last date appellee commenced to improve portions of said right of way so used by the public. Appellant brought suit to enjoin the improvement of said streets and to quiet its title to the whole of said right of way as against said town. Upon the hearing of said cause, the court decreed that a strip on the south side of said right of way, forty-seven feet in width at Ohio street and forty feet in width at the east line of Kentucky street, known as South Railroad street, and a strip forty feet in width on the north side of said right of way, between Ohio street and the eastern corporation limits, and known as North Railroad street, were declared to be public streets, to be used by the public and appellant mutually as streets. The court also

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decreed that the title to all of the remainder of said right of way in said town, except that portion thereof covered by Main, New York, Ohio, Indiana, Illinois and Kentucky streets at the intersections, should be quieted in appellant, and appellee and all persons acting under or through it or by its authority were forever enjoined and restrained from entering upon or improving for a street or highway for travel, and from grading, hauling or depositing any stone, earth, gravel, macadam or other substance upon any part of appellant's said land, except upon said street crossings.

It was further decreed that neither party should erect any barriers between Ohio street and Indiana street to prevent free access to the depot or streets. Appellant proposes to fence only that portion of its said land so decreed to belong to it and from which appellee and the public were excluded, and in which, by said decree, appellee and the public were adjudged to have no interest; leaving the streets, street intersections and depot approaches open for the free use of the public.

Appellee's contention is that the whole of said right of way between Ohio and Indiana streets was declared to be open to the public as a public street, by virtue of the last

1. clause in said decree which provided: "Neither party shall erect any barriers between Ohio street and Indiana street to prevent free access to the depot or streets." This contention of appellee cannot be sustained by the language of the decree. In the first place it is decreed that appellee and the public have no right or interest in that portion of the right of way proposed to be fenced, and there is nothing in the language of the clause quoted that is inconsistent with this order. Appellant does not propose to fence or place any barriers in any streets or on any portion of the right of way declared to be streets. The evidence shows that the fence, when erected, will not prevent free access to the streets of said town or to the depot of said company, although the public will be confined, in

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going to such streets or depot, to the established streets of said town. This certainly comes within the meaning of free access. It is true, the fence will prevent the public from going at will across the right of way at any point from which any one might choose to reach the depot, but this right the public certainly has no inherent authority to exercise. In fact, such an exercise would be dangerous to the lives of the people of said town, as well as to the lives of the traveling public.

The evidence shows that after the proposed fence is constructed a person can pass from any point on South Railroad street along it to any of the intersecting streets or

2. to appellant's depot, and from any point on North Railroad street along said street to any intersecting street, and along said intersecting street to South Railroad street, thence along said South Railroad street to any intersecting street or to appellant's depot. This certainly meets the requirement of "free access" thereto.

The position of appellee in this case is wholly inconsistent with its position in the case of *Pittsburgh, etc., R. Co. v. Taber* (1907), 168 Ind. 419, where it sought to levy assessments on this very ground that appellant proposes to fence, to pay for the improvement of the street established in the action upon which this case rests, wherein it was contended that said ground was the private property of appellant. Certainly if it all was a portion of the street, it was not subject to assessment for the improvement thereof. The Supreme Court in that case held that said ground was the property of appellant and subject to assessment. The appellant unquestionably has the right to fence its right of way, so long as it does not erect barriers in any of the streets of the town, as legally established, and so long as such barriers do not prevent free access of the streets of said town and its depot along the established streets.

Judgment reversed, with instructions to grant a new trial.

Pittsburgh, etc., R. Co. v. Town of Remington—45 Ind. App. 561.

ON PETITION FOR REHEARING.

HADLEY, J.—It is urged in the petition for a rehearing that we did not pass upon the question raised as to the sufficiency of the complaint. We have considered the

3. complaint, and find that, while it seeks to show that an easement to pass indiscriminately over the right of way between Ohio and Indiana streets by setting out that portion of the decree set out and construed in the former opinion, and while under our construction of that decree an easement to pass indiscriminately over the right of way is not given, it does grant free access to the depot and streets as defined in that opinion. The complaint does aver that the fence or barrier that appellant threatens to erect will prevent such free access, and, by so doing, will commit great and lasting injury to appellee that cannot be compensated in damages. In our opinion this, with the other averments, states a good cause of action. The demurrer was properly overruled.

Appellee also contends that if the fence is constructed as proposed it would completely destroy appellee's ways to the depot from the south, and prevent the loading and

4. unloading of freight at the depot. No such suggestion was made in the original brief, and there is no evidence in the record that shows this state of facts. We
5. do not hold that appellant may so build its fence as to present such a condition, as this would be the prevention of "free access." There must not only be "access," but it must be "free," as defined in the original opinion.

Appellee also seeks to inject into the decree of 1901 certain mutual understandings and agreements in parol. There is no averment in the pleadings to warrant this.

The petition for a rehearing is overruled.

ROBERTS, ADMINISTRATRIX, v. DIMMETT ET AL.

[No. 6,787. Filed October 29, 1909. Rehearing denied January 5, 1910. Transfer denied March 15, 1910.]

1. EXECUTORS AND ADMINISTRATORS.—*Final Reports.—Exceptions.—Special Findings.—Venire de Novo.*—Where exceptions are filed to certain items of an administratrix's final report, special findings covering only such items are sufficient, and a motion for a *venire de novo* on the ground that they do not cover the whole report, should be overruled. p. 568.
2. APPEAL.—*New Trial.—Evidence Not in Record.*—Where the record on appeal does not contain the evidence, a specification in the motion for a new trial that the evidence does not sustain the special findings, cannot be considered. p. 569.
3. TRIAL.—*Conclusions of Law.—Exceptions.*—Exceptions to conclusions of law admit the correctness of the special findings. p. 569.
4. DESCENT AND DISTRIBUTION.—*Childless Widow.—Statutes.*—Under §2927 Burns 1908, §2405 R. S. 1881, providing that after the payment of debts, legacies and expenses of administration, a decedent's estate shall be distributed to his legal heirs, and §3018 Burns 1908, Acts 1889, p. 131, §1, providing that one-third of the personal property of an intestate, where there are two or more children surviving, shall descend to the widow, and if but one child, one-half shall descend to each, such widow takes such part only after the payment of debts. pp. 569, 570.
5. EXECUTORS AND ADMINISTRATORS.—*Debts.—From What Property Payable.*—The debts of a decedent constitute a primary charge against his personal property. p. 570.
6. DESCENT AND DISTRIBUTION.—*Widows.—Election.—Wills.—Presumptions.*—A widow may elect not to take under her husband's will, and the presumption is that the law does not discriminate between the widow of a testate and of an intestate husband. p. 570.

From Warrick Circuit Court; *Roscoe Kiper*, Judge.

Final report by Matilda Roberts, as administratrix of the estate of Monroe Roberts, deceased, to which William Dimmett and others except. From a judgment for the executors, the administratrix appeals. *Affirmed.*

Thomas W. Lindsey, for appellant.

S. B. Hatfield, *W. S. Hatfield* and *F. H. Hatfield*, for appellees.

COMSTOCK, J.—On June 5, 1907, appellant as administratrix of the estate of Monroe Roberts, deceased, filed in the Warrick Circuit Court her final settlement report, in which she set out her various acts in the course of administration, the amount of money she received in her trust capacity and the amount expended. On June 7 appellees filed exceptions and objections to various credits claimed in the final report as follows: To credit number one, wherein said administratrix paid to herself, as widow, the sum of \$457.09, being one-third of decedent's personal property, which amount was excessive, she being entitled as such widow to only one-third of the personal property after paying her statutory allowance of \$500 and the debts of said estate, that is, one-third of the part remaining after the payment of said debts and her said statutory allowance; to credit number 6, wherein said administratrix paid to herself \$54 for services rendered, which sum was excessive; to credit number seven, wherein the administratrix paid to herself the sum of \$26 for expenses incurred, which sum was excessive, and not having been actually incurred; to credit number eight, wherein said administratrix paid herself the sum of \$84.40 for services rendered, which sum was excessive; and in credit number five objection is made to any money paid to or for Ora Roberts or Euphratus A. Roberts, for the reason that the judgment of the court and verdict of the jury heretofore rendered and returned herein show that during the lifetime of Monroe Roberts they received from him more than their full shares of his estate.

The court, at the request of the administratrix, made a special finding of facts and stated conclusions of law thereon. The special findings show, in substance, that on December 2, 1905, Monroe Roberts died intestate in Warrick county, Indiana, leaving as his only heirs at law Matilda Roberts, a childless third wife, his children, and his grandchildren. On December 5, 1905, said Matilda Roberts was appointed administratrix and she qualified and entered upon the duties of

administering the estate. The services of said administratrix and expenses incurred by her in the administration of said estate were necessary, and were reasonably worth the sum of \$125, the amount claimed in the report being \$164.40. During the lifetime of said Monroe Roberts he advanced to his following named children the following amounts: To Euphratus A. Roberts the sum of \$1,242; to James W. Roberts, father of Ora Roberts, \$980; to Mary Austill, \$500; to Amanda Dimmett, \$400; to Francis Dimmett, mother of Ada Williams, Benjamin Dimmett, Ernest Dimmett and Nita Dimmett, \$600.

As conclusions of law the court stated (1) that said administratrix shall be allowed the sum of \$125 for her services and expenditures in the administration of her decedent's estate; (2) that said Matilda Roberts, as the widow of Monroe Roberts, is entitled to one-third of the surplus of said estate remaining in the hands of said administratrix after the payment of the debts and liabilities of said estate; (3) that the advancements found to have been made by said decedent should be taken into consideration by said administratrix in distributing to each of said heirs the amounts due them from said estate. To each of said conclusions of law appellant excepted.

Appellant assigns as errors the overruling of her motions for a *venire de novo* and for a new trial, and that the court erred in its conclusions of law numbered one, two and three.

The issues were formed on the report and exceptions thereto.

In support of the motion for a *venire de novo*, it is claimed that the special findings are so defective, uncertain and ambiguous that no judgment can be rendered thereon.

1. and that they do not disclose the amount of money to be paid on the debts of the decedent, nor the amount of money to be paid to the widow. It was not necessary to set out in the special findings the various items of the report. The special findings pertain to the issues raised by the excep-

tions. The conclusions of law are sufficiently explicit for a judgment on the issues. The motion for a *venire de novo* was therefore properly overruled.

The motion for a new trial, questioning the sufficiency of the evidence to sustain the special findings, could only

2. be considered upon a review of the evidence in the case, which is not attempted to be made a part of the record.

The exceptions to the conclusions of law and to each

3. of them admit the correctness of the facts found, and the conclusions are supported by said findings.

The only controverted question of consequence is, What portion of the estate is appellant, a childless third wife, entitled to under the statute? It is the claim of appel-

4. lant that she is entitled to receive one-third of the total amount of personal property before the payment of any debts of the estate or expenses or her absolute claim of \$500. We think this claim cannot be allowed. Section 2927 Burns 1908, §2405 R. S. 1881, provides that "when the deceased shall have died intestate, the surplus of his estate remaining in the hands of the executor or administrator, after the payment of debts and expenses of administration (and in case the deceased died testate, after the payment of legacies also), shall be distributed to the legal heirs of the deceased according to the laws of this State in force at the time of his death," etc. Section 3018 Burns 1908, Acts 1899, p. 131, §1, provides "that if a man die intestate, leaving a widow and child, or children, not exceeding two, the personal property of such intestate shall be equally divided among the widow and children, the widow taking an equal share with one child, but if the number of children exceed two, the widow's share shall not be reduced below one-third of the whole." Under this section the share of the widow where she is left with two or more children cannot be reduced below one-third of the whole of the personal estate. If she is left with one or with two children she is entitled to an

equal share with one child. In connection with §2927, *supra*, this must be held to mean that the estate distributed is the residue after the payment of debts. It is only upon this construction that the widow and child can share

5. equally, the personal property being primarily the fund out of which the debts of the estate are to be paid. This construction has been recognized in the case of *Ruch v. Biery* (1887), 110 Ind. 444, 450. See, also, *Shaffer v. Richardson* (1866), 27 Ind. 122.

When the number of children does not exceed two, the widow shares equally with each in the personal estate after payment of the debts. In such case, if the widow

4. should receive one-third of the whole of the personal estate free from debts the equality of the distribution would be destroyed, for a child is given its share of the estate subject to the debts of its ancestor. Section 3025 Burns 1908, Acts 1891, p. 404, gives to the widow of a man who dies testate, one-third of his personal estate, subject to its proportion of the debts of the decedent, making the interest of the widow in the personal estate of one who dies testate the same as the widow of one who dies intestate, except where there are surviving children.

The widow of one who dies testate may elect to take under the will or under the statute, but it will not be pre-

6. sumed that the law intended to discriminate between the widow of a man dying testate and one dying intestate.

By the conclusions of law certain credits claimed by the administratrix's final report objected to by appellees are disallowed, and by the judgment of the court it is

4. properly ordered that the administratrix pay to the commissioner the sum of \$321.80, money received from him as shown by said report and to which she was not entitled, and amend her report in accordance with the special findings. Under the conclusions of law and the judgment, appellant was entitled only to one-third of the personal estate

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remaining after payment of debts and the \$500 allowed the widow by statute. This, the judgment of the trial court awards her.

Judgment affirmed.

BAILEY, ADMINISTRATOR, v. WILSON.

[No. 7,350. Filed March 16, 1910.]

EXECUTORS AND ADMINISTRATORS.—*Claims Against.—Complaint.—Sufficiency of.*—A claim against a decedent's estate, containing a definite statement of the liability, the amount thereof, and facts sufficient to bar another claim therefor, is sufficient. *Bailey v. Miller, ante*, 475, followed.

From Probate Court of Marion County; *Frank B. Ross*, Judge.

Action by Sylvester F. Wilson against Andrew J. Bailey, as administrator of the estate of Jehu Miller, deceased. From a judgment for plaintiff, defendant appeals. *Reversed.*

Newton M. Taylor, for appellant.

Schuyler A. Haas and *Elias D. Salsbury*, for appellee.

COMSTOCK, J.—Appellee filed his amended complaint in this cause against appellant who is the administrator of the estate of Jehu Miller, deceased, for breach of contract arising out of the sale of the right to use in Lucas county, Ohio, a certain patent for the construction of cisterns. This contract was executed by decedent and the plaintiff, on August 18, 1905.

A demurrer for want of facts was overruled to the complaint and an exception taken. Defendant stood upon the general denial which the law puts in as to claims against estates. The cause was submitted to a jury for trial, which resulted in a verdict against defendant for \$500. Defendant's motion for a new trial was overruled and an exception

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taken. Plaintiff filed a remittitur for all except \$350, and judgment was rendered for that amount.

The first and second specifications of error challenge the sufficiency of the complaint, and the third, the action of the court in overruling appellant's motion for a new trial.

It is urged in behalf of appellee that, for various reasons, no question is presented as to the sufficiency of the complaint or the overruling of appellant's demurrer thereto, but, without considering this point, we have read the complaint and find that it contains a definite statement of appellee's claim, the amount thereof, and enough to bar another action therefor, and that, as a statement of a claim against an estate, it is sufficient. *King v. Snedeker* (1894), 137 Ind. 503; *Miller v. Eldridge* (1891), 126 Ind. 461; *Hileman v. Hileman* (1882), 85 Ind. 1; *Christian v. Highlands* (1903), 32 Ind. App. 104. In the case of *Bailey v. Miller* (1910), *ante*, 475, the sufficiency of the complaint was not passed upon, but substantially the same questions upon the merits of the controversy were decided which are sought to be presented in this appeal; and upon the authority of that case the judgment is reversed, with instructions to sustain appellant's motion for a new trial.

BIGGS v. SCHOOL CITY OF MOUNT VERNON.

[No. 6,912. Filed December 14, 1909. Rehearing denied February 15, 1910. Transfer denied March 16, 1910.]

1. APPEAL.—*Affirmance.*—*Weighting Evidence.*—The Appellate Court will not weigh conflicting evidence, nor consider any testimony except that which sustains the verdict. p. 574.
2. SCHOOLS.—*Teacher.*—*Implied Qualifications.*—*Contracts.*—A school teacher in accepting employment impliedly agrees that he has the requisite knowledge to teach the prescribed branches, and that he has the ability, in a reasonable degree, to impart that knowledge to pupils. p. 575.
3. SCHOOLS.—*Teachers.*—*"Incompetent."*—*Discharge.*—*Justification.*—A school board is justified in discharging a school teacher

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who is unable to maintain discipline in his school, such teacher being "Incompetent." p. 575.

From Superior Court of Vanderburgh County; *Alexander Gilchrist*, Judge.

Action by Joseph Biggs against the School City of Mount Vernon. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Ulric Z. Wiley, for appellant.

Spencer & Brill and *Frank H. Hatfield*, for appellee.

COMSTOCK, J.—Appellant, plaintiff below, commenced this action in the Posey Circuit Court against appellee, to recover damages for the alleged breach of a written contract of employment, and his discharge without cause.

Upon proper application the cause was venued to the court below, where an amended complaint was filed. To this complaint the appellee answered in three paragraphs: (1) Justification; (2) payment; (3) general denial. Upon the issues thus formed the cause was tried by the court. There was a general finding in favor of appellee, and, over a motion for a new trial, judgment was rendered thereon.

We quote from appellant's brief: "In this case, as the record comes to the court, the only available question is presented by appellant's motion for a new trial, based solely upon the insufficiency of the evidence to support the finding, and that the finding is contrary to law." It appears from the allegations of the amended complaint that appellant entered into a written contract with appellee, through its agents, to teach the students and assume all the duties incumbent upon a principal teacher in the colored school in the city of Mount Vernon, for and during the school year beginning September 12, 1904; that for such services he was to receive the sum of \$60 per month. The contract is copied into said complaint, and contains, among other things, the agreement on the part of appellant

"faithfully, zealously and impartially to perform all the duties as such teacher, and to make all reports re-

taken. Plaintiff filed a remittitur for all except \$350, and judgment was rendered for that amount.

The first and second specifications of error challenge the sufficiency of the complaint, and the third, the action of the court in overruling appellant's motion for a new trial.

It is urged in behalf of appellee that, for various reasons, no question is presented as to the sufficiency of the complaint or the overruling of appellant's demurrer thereto, but, without considering this point, we have read the complaint and find that it contains a definite statement of appellee's claim, the amount thereof, and enough to bar another action therefor, and that, as a statement of a claim against an estate, it is sufficient. *King v. Snedeker* (1894), 137 Ind. 503; *Miller v. Eldridge* (1891), 126 Ind. 461; *Hileman v. Hileman* (1882), 85 Ind. 1; *Christian v. Highlands* (1903), 32 Ind. App. 104. In the case of *Bailey v. Miller* (1910), *ante*, 475, the sufficiency of the complaint was not passed upon, but substantially the same questions upon the merits of the controversy were decided which are sought to be presented in this appeal; and upon the authority of that case the judgment is reversed, with instructions to sustain appellant's motion for a new trial.

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who is unable to maintain discipline in his school, such teacher being "incompetent." p. 575.

From Superior Court of Vanderburgh County; *Alexander Gilchrist*, Judge.

Action by Joseph Biggs against the School City of Mount Vernon. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Ulric Z. Wiley, for appellant.

Spencer & Brill and *Frank H. Hatfield*, for appellee.

COMSTOCK, J.—Appellant, plaintiff below, commenced this action in the Posey Circuit Court against appellee, to recover damages for the alleged breach of a written contract of employment, and his discharge without cause.

Upon proper application the cause was venued to the court below, where an amended complaint was filed. To this complaint the appellee answered in three paragraphs: (1) Justification; (2) payment; (3) general denial. Upon the issues thus formed the cause was tried by the court. There was a general finding in favor of appellee, and, over a motion for a new trial, judgment was rendered thereon.

We quote from appellant's brief: "In this case, as the record comes to the court, the only available question is presented by appellant's motion for a new trial, based solely upon the insufficiency of the evidence to support the finding, and that the finding is contrary to law." It appears from the allegations of the amended complaint that appellant entered into a written contract with appellee, through its agents, to teach the students and assume all the duties incumbent upon a principal teacher in the colored school in the city of Mount Vernon, for and during the school year beginning September 12, 1904; that for such services he was to receive the sum of \$60 per month. The contract is copied into said complaint, and contains, among other things, the agreement on the part of appellant

"faithfully, zealously and impartially to perform all the duties as such teacher, and to make all reports re-

quired by the school board, superintendent or school law, and to conform to all the rules and regulations of said board and superintendent, and faithfully and impartially to enforce them among the pupils."

Said contract further provides:

"In case said teacher shall be discharged from said school by said board for incompetency, cruelty, gross immorality, neglect of business, or a violation of any of the stipulations of this contract, * * * he shall not be entitled to any compensation after notice of dismissal," etc.

It is further alleged that appellant entered upon the discharge of his duties under said contract, and continued so to discharge them until November 23, 1904, when he received a notice in writing from appellee that the contract should terminate on that day, and that on said day, without cause or fault on the part of appellant, appellee discharged him as the principal teacher of said school; that by said discharge he was left without employment as a teacher, which was his usual employment, and the one for which he had fitted himself; that he was unable to secure other employment; that said discharge was a serious attack upon his character and reputation, and on his competency as a teacher, and that by reason thereof he was compelled to leave the city of Mount Vernon and to seek employment elsewhere, to his damage, etc.

The decisions holding that an appellate court will not weigh the evidence or reverse a cause on conflicting evidence, or consider any testimony except that which sustains

1. the verdict or finding, are without number, therefore we cite none. In this case the evidence is conflicting.

The learned trial court might have concluded that from the educational advantages which the evidence showed appellant had enjoyed, and from his experience as a teacher, he was fairly well equipped so far as mere knowledge of the textbooks was required, although there was evidence showing that he was deficient in some of the branches that he at-

tempted to teach, and plainly lacking in ability to impart the knowledge that he possessed.

A teacher in accepting employment impliedly agrees that he has the knowledge necessary to enable him to teach the

branches that are to be taught, and that he has the

2. capacity, in a reasonable degree, to impart that knowledge to others. *City of Crawfordsville v. Hays* (1873), 42 Ind. 200.

There is evidence, uncontradicted, showing that appellant was wanting in practical efficiency and discipline. Within a

few days after he began his work he had trouble with

3. various of his pupils, which trouble continued to the end of his service. This trouble was so serious as to interfere with the work of the school. One witness testified:

"The disturbance in the room was general; the pupils doing whatever they pleased. * * * I went in once or twice, and their conduct was something furious." Appellant, in effect, admitted his inability to maintain order. Upon one occasion he threatened to call the police. Under his predecessor and under his successor the untoward conditions which resulted in the dismissal of appellant did not exist. "Incompetency," as employed in the contract, is a relative term, denoting a want of the requisite qualifications for performing a given act or service. Appellant failed where others, under like conditions, succeeded; whether from lack of scholastic attainments, or want of physical and mental qualities which sometimes "strike terror" if they do not "inspire respect," is immaterial. It does not appear that he was guilty of cruelty or immorality, but the fact remains that he failed in the orderly conduct of the school, and had ceased to be useful in his office. The trustees wanted a return in the way of useful service for the public money, which they felt they were not getting. It is admitted that on December 2, 1904, after appellant's dismissal, with the advice of his counsel he received and receipted to the school trustees for \$39, in full for his services from November 7, 1904, to November

Niagara Oil Co. v. McBee—45 Ind. App. 576.

23, 1904. There is sufficient evidence to sustain the findings and judgment of the court.

Judgment affirmed.

NIAGARA OIL COMPANY v. MCBEE.

[No. 6,741. Filed March 16, 1910.]

1. **MECHANICS' LIENS.**—*Oil Wells.*—*Coal Used in Sinking.*—*Judicial Notice.*—Under §8295 Burns 1906. Acts 1899, p. 569, providing that "all persons performing labor or furnishing material or machinery * * * may have a lien" upon the structure "for which they may have furnished material or machinery of any description, * * * to the extent of the value of any labor done, material furnished or either," a person who furnishes coal to an independent contractor to be used in generating power to sink an oil well, for defendant, has no right to a mechanic's lien upon such well or its fixtures, the court taking judicial notice that such coal did not actually become a part of such well or fixtures. *Haskell v. Gallagher*, 20 Ind. App. 224, overruled. p. 579.
2. **MECHANICS' LIENS.**—*Statutes.*—*Construction.*—The statute providing for the creation of mechanics' liens (§8295 Burns 1906, Acts 1899, p. 569) is strictly construed in determining what persons are entitled to the benefits thereof. p. 579.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Suit by Miller McBee against the Niagara Oil Company. From a decree for plaintiff, defendant appeals. *Reversed.*

Simmons & Dailey and *F. A. Shaw*, for appellant.

Walter L. Ball and *A. E. Needham*, for appellee.

MYERS, C. J.—Appellee instituted this action against appellant and others to collect \$325.32 for coal, alleged to have been sold and delivered to appellant and others, and to enforce a mechanic's lien against certain property belonging to appellant. Appellee dismissed as to all the parties, named in the complaint as defendants, except appellant. The complaint was in one paragraph, to which appellant's demurrer for want of facts was overruled, and this ruling is assigned as error. The complaint shows that for coal sold and deliv-

ered by appellee to appellant, a certain sum of money was due and unpaid. It was sufficient to withstand a demurrer for want of facts. *Farrell v. LaFayette Lumber, etc., Co.* (1895), 12 Ind. App. 326. Appellant answered the complaint in two paragraphs. The first was a general denial. The second paragraph, in substance, averred that the Niagara Oil Company was the owner of an oil and gas lease on the real estate described in the complaint, and had no other interest therein; that, as such owner, appellant entered into a contract with Demick & Whitney, whereby the latter agreed to construct and complete oil and gas wells on said real estate for said company; that, in the construction and completion of said wells, said Demick & Whitney entered into a contract with plaintiff, whereby said plaintiff furnished to said Demick & Whitney the coal mentioned in the complaint, and which was used by them only as fuel to generate steam for power in the operation of machinery used in the drilling of said wells, and was used for no other purpose; that defendant never bought or received any coal from plaintiff, and at no time had any contractual relations with plaintiff for the purchase of any coal, and never agreed at any time to pay plaintiff for said coal; that said coal was used by said Demick & Whitney for the purpose before stated and for no other whatever. A demurrer to this paragraph of answer, for want of facts, was sustained, and that ruling is assigned as error.

Certain other proceedings were had in said cause whereby issues were formed, and the cause submitted to the court for trial. The court made a special finding of facts, and stated conclusions of law thereon. Over appellant's objection and exception to each conclusion of law, a decree was entered in favor of appellee. Error is based on the exceptions to the conclusions of law.

In substance, it appears from the special findings that on November 27, 1906, and for five years prior thereto, appellee

was a resident of Delaware county, Indiana, and was engaged in the grain and coal business; that on said last-mentioned date, and for a year prior thereto, Clarence Demick and one Whitney were engaged in the business of drilling and constructing oil wells in said county, under the firm name of Demick & Whitney; that during the months of August, September, October and November, 1906, the appellant was the owner of a gas and oil lease on a certain farm in said county, and, as such owner, contracted with said firm to drill and construct two oil wells upon said land, and in pursuance of said contract said firm, in the months aforesaid, did drill, construct and complete said wells; that appellee sold and delivered to said firm, while so engaged in constructing and completing said wells, a certain quantity of coal at a price named a ton for the first well, and a certain quantity for the second well, all of which was used in drilling, constructing and completing said wells upon said farm, and upon the lease of appellant and for appellant; that said coal was furnished and delivered by appellee to said firm upon a contract between them, and used by the firm as aforesaid; that within sixty days from the time of the last delivery of coal to said firm, as aforesaid, appellee caused notice of his intention to hold a mechanic's lien upon said lease and leasehold rights, and all oil well structures, derricks, etc., to be filed in the office of the recorder of said county, stating in said notice his intention to hold a lien upon said structures for the amount of his claim, etc. Upon the facts found the court concluded that appellee was entitled to a lien and to a foreclosure thereof against appellant upon said oil well structures and leasehold rights, and that they should be sold to make assets to pay appellee's claim in the sum of \$253, including attorneys' fees, and for the payment of the costs.

The controlling question in this case is, Was appellee entitled to a mechanic's lien on appellant's property for coal

furnished by appellee to Demick & Whitney, con-
1. tractors, and used by them as fuel to generate steam
for power to run machinery used in the drilling and
constructing of oil wells for appellant? This question is
presented by the errors assigned upon the ruling of the court
on the demurrer to the answer, and upon the exceptions to
the conclusions of law. Appellee evidently proceeded under
§8295 Burns 1908, Acts 1899, p. 569, which provides: "That
contractors * * * and all persons performing labor or
furnishing material or machinery * * * may have a
lien separately and jointly upon the house * * * which
they may have erected * * * or for which they may
have furnished material or machinery of any description,
* * * to the extent of the value of any labor done, ma-
terial furnished or either." This section of our mechanics'
lien law was before the Supreme Court in the case of *Potter*
Mfg. Co. v. A. B. Meyer & Co. (1909), 171 Ind. 513, and the
ruling there announced requires the party claiming a lien to
show not only that the materials were furnished for and were
actually used in erecting, altering or repairing the structure
on which the lien is asserted, but that they were furnished
upon a contract which required the title to the materials fur-
nished to pass to the owner of the property subject to the
lien and became a part thereof, and to some extent enhanced
its value. While the special findings in this case exhibit a
purpose to make the coal used a part of the structure, yet
we cannot close our eyes to the fact that it was not used in
such a way as to become and remain any part of it.

The Supreme Court and this court have held in a number
of cases that this statute must be strictly construed in deter-
mining what persons are entitled to its protection.

2. *Indianapolis, etc., Traction Co. v. Brennan* (1910),
174 Ind. 1; *Cincinnati, etc., Railroad v. Shera* (1905),
36 Ind. App. 315; *Krotz v. A. R. Beck Lumber Co.* (1905),
34 Ind. App. 577. In the case of *Morris v. Louisville, etc., R.*

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Co. (1890), 123 Ind. 489, it is said: "Courts must construe and enforce the statute as a remedial one, but they cannot extend it to meet cases not within its scope, however meritorious they may be." In the case of *Mossburg v. United Oil, etc., Co.* (1901), 43 Ind. App. 465, the question here presented was considered by this court and decided adversely to appellee. Appellee relies largely on the case of *Haskell v. Gallagher* (1898), 20 Ind. App. 224, 67 Am. St. 250. The later cases seem to be in conflict with the former, and so far as it purports to hold that a lien may be had and enforced for fuel furnished and used in drilling a gas or oil well, the case is now overruled. The weight of authority is with appellant upon the question under consideration.

Judgment reversed, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and render a judgment in favor of appellant.

LAKE ERIE AND WESTERN RAILROAD COMPANY v. COTTON.

[No. 6,632. Filed March 17, 1910.]

1. CARRIERS.—*Railroads.*—*Passengers.*—*Alighting.*—*Complaint.*—A complaint alleging that the plaintiff was a passenger on defendant railroad company's train, that the brakeman announced plaintiff's destination and opened the door, that the plaintiff arose and walked to the door as the train came to a stop, that the train stopped suddenly, causing plaintiff to catch the door facing to prevent his falling, that the stop caused the door to close, catching plaintiff's hand and inflicting injury, that such injury was caused by the carelessness of defendant in opening the door, in not fastening it securely and in suddenly stopping the train, states a cause of action. p. 581.
2. CARRIERS.—*Passengers.*—*Railroads.*—*Care.*—Railroad companies are required to use the greatest practicable care toward their passengers. p. 583.
3. CARRIERS.—*Passengers.*—*Alighting.*—*Railroads.*—*Negligence.*—*Contributory.*—*Question for Jury.*—Whether a passenger is contributorily negligent in alighting from a train, and whether the railroad company was negligent in inviting him to alight, are questions for the jury. p. 585.

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4. **CARRIERS.—Passengers.—Alighting.—Railroads.—Complaint.—Paragraphs.—Instructions.**—Where one paragraph alleged that the plaintiff was injured while standing in the door of defendant railroad company's coach, and another that he was on the platform, the injury in each case being caused by the closing of the door upon his hand, an instruction that the paragraphs were substantially the same is not prejudicial to the company. p. 585.
5. **CARRIERS.—Railroads.—Passengers.—Stepping Upon Platform of Coach.—Statutes.**—A passenger on a railroad train, who goes upon the platform of a car at the invitation of the brakeman, preparatory to alighting, and who is there injured because of the company's negligence, is not precluded from a recovery by §5316 Burns 1908, §3928 R. S. 1881, prohibiting a recovery, where the passenger went upon the platform in violation of the posted rules of the company. p. 585.
6. **TRIAL.—Instructions.—Inconsistency.—Estoppel.**—Appellant is estopped to complain of inconsistencies in the instructions, where such inconsistencies were caused by erroneous instructions given at its request. p. 585.
7. **CARRIERS.—Accidents to Passengers.—Presumptions.—Burden of Proof.**—Carriers are required to remove the presumption of negligence arising from the happening of an accident to a passenger. p. 586.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Carroll C. Cotton against the Lake Erie and Western Railroad Company. From a judgment on a verdict for plaintiff for \$300, defendant appeals. *Affirmed.*

John B. Cockrum and Shirts & Fertig, for appellant.

Kane & Kane and Gifford & Gifford, for appellee.

MYERS, C. J.—Appellee brought this action against appellant to recover damages for injuries alleged to have been caused by appellant's negligence. The complaint was in two paragraphs, to each of which appellant's demurrer for want of facts was overruled.

The first paragraph showed that at the time of the accident appellee was a passenger on one of appellant's passenger-trains from the city of Elwood to the station of

1. Goldsmith; that when the train approached the latter place, and was moving at a speed not to exceed one or

two miles an hour, and when within six or eight rods of the station, the brakeman, employed by appellant and on duty on said train, opened the door of the coach in which appellee was riding, pushed the door back to the full width, called the station of Goldsmith, and stepped out upon the platform of the coach; that the door was left open after the station was called, in order that passengers in the coach who desired to leave the train at Goldsmith might alight therefrom; that after the station had been called and the door had been opened for the passengers to alight, and while the train was running at the aforesaid speed, appellee arose from his seat and walked slowly in the direction of the door, for the purpose of leaving the car at the time the train reached the station; that as he approached the door, and was within two or three feet thereof, the train, for some cause unknown to appellee, but as he believes by the sudden application of the air-brakes, was given a sudden jerk or stop; that the sudden stop in the movement of the train threw appellee forward, and, for the purpose of supporting himself, he placed his left hand against the door facing of the car; that the same cause that threw him forward and caused him to support himself loosened the door from the fastening that held it open, and caused it to swing around on its hinges and close; that his act of supporting himself against the door facing and the closing of the door were so nearly simultaneous, and done with such rapidity, that he had not time to remove his fingers and extricate his hand from the closing door; that his first, second and third fingers were caught between the door and the facing. The injury to his hand is described, and the damages alleged at length.

The pleading then proceeded as follows: "That said injury was caused by the carelessness and negligence of defendant in opening said door, in calling said station, in not fastening said door securely when opened, and by the negligence and carelessness of defendant in giving said train a sudden jerk or stop by the application of the air-brakes.

by reversing the engine or by other means, thus causing the door to close and plaintiff the necessity of supporting himself; that said injury was caused by the negligence and carelessness of defendant as aforesaid, and that plaintiff was without fault or negligence on his part in all of the aforesaid matters." The second paragraph was substantially like the first, except that it alleged that appellant approached the door and stepped upon the platform, along with the conductor and brakeman, just as the train reached the station.

Appellant first insists that neither paragraph of the complaint was sufficient as against its demurrer for want of facts. In support of that contention it asserts that no facts are directly alleged in either paragraph showing that the acts or omissions of appellant causing the injury were negligently done or negligently omitted to be done; that the allegations near the close of the pleading and before quoted constitute only an attempt to show the element of proximate cause, and do not take the place of direct and substantive allegations that appellant was negligent in any respect.

This case is one of a class where the law imposes upon the company the exercise of the greatest care practicable for the safety of its passengers, and holds it responsible for

2. an injury to a passenger caused by its negligence concerning the condition of its road, the character of its machinery and cars, the sufficiency of its equipments, and the skill and conduct of its agents and employes, the passenger being without fault. *Grand Rapids, etc., R. Co. v. Boyd* (1879), 65 Ind. 526; *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74; *Louisville, etc., Traction Co. v. Worrell* (1909), 44 Ind. App. 480. In the case of *Louisville, etc., Ferry Co. v. Nolan* (1893), 135 Ind. 60, it is held to be the "settled law of this State that a carrier of passengers is not an insurer of the safety of its passengers, but it is required to exercise the highest degree of care to secure their safety, and it is liable to a passenger, who is himself without

fault, for any omission or failure to exercise this power, and for the slightest neglect of duty in this respect." In the case of *Louisville, etc., R. Co. v. Kendall* (1894), 138 Ind. 313, the complaint showed that plaintiff was a passenger, and that, without his fault, on account of the carelessness and negligence of one of defendant's agents, plaintiff was by such employe of defendant pushed from the platform of the train as it was starting, and, without his fault, he fell between the cars and was carelessly and negligently caught and run over by defendant's train and was crushed; and "that all of said injuries were caused by, and were the direct result of, said carelessness and negligence of defendant in pushing plaintiff off its said train, as aforesaid, and in carelessly and negligently running over him with its train, as aforesaid, and wholly without the fault or negligence of plaintiff." The objection was made in that case, as it is in effect here, that if plaintiff had alleged that defendant negligently pushed him off the platform, the pleading would have been good. The court held that the complaint fairly alleged "in the language last quoted from it, that defendant's negligence in pushing plaintiff from the car caused the injuries complained of, and, considering that allegation in connection with the former allegation that the act was committed by appellant's agent, there is no room to doubt that it may be fairly understood from the complaint that recovery is sought for the company's wrong inflicted by its agent in pushing plaintiff from the car." A comparison of this decision with the language of the complaint before us compels us to hold the complaint sufficient. See, also, *Citizens St. R. Co. v. Jolly* (1903), 161 Ind. 80; *Indianapolis St. R. Co. v. Schmidt* (1904), 163 Ind. 360; *Baltimore, etc., R. Co. v. Harbin* (1903), 160 Ind. 441.

Appellant's motion for a new trial was overruled.

We find no occasion for disturbing the conclusion of the jury upon the evidence. Whether there was negligence

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upon the part of appellee in arising from his seat

3. and proceeding to the exit while the train was still in motion, running slowly as it neared the stopping place where he was to alight, was a question for the jury. *Romine v. Evansville, etc., R. Co.* (1900), 24 Ind. App. 230; *Cincinnati, etc., R. Co. v. Grames* (1893), 136 Ind. 39; *Louisville, etc., R. Co. v. Crunk* (1889), 119 Ind. 542, 12 Am. St. 443; *Pennsylvania Co. v. Marion* (1890), 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. 330.

It is also insisted that the court erred in instructing the jury "that the material allegations of the two paragraphs of the complaint were substantially the same." There

4. was no essential difference as to the nature of the cause of action between the first and second paragraphs, and there was no error in so instructing the jury. So far as it was shown in evidence that appellee had stepped with one foot upon the platform while the other yet remained within the car or in the doorway, the case did not present a cause of action for injury while riding upon the plat-

5. form, within the meaning of the statute relieving the railroad company from liability for injury to a passenger upon the platform, in violation of the printed regulations of the company posted in a conspicuous place inside of the car. §5316 Burns 1908, §3928 R. S. 1881. No such notice appeared in evidence, and appellee was not riding upon the platform in the sense of the statute, but was stepping upon it for the purpose of alighting from the car, if, indeed the jolting or lurching of the car did not place him in that position.

Appellant complains of inconsistency in the instructions; but the inconsistency was caused by the giving of an erroneous instruction proposed by appellant, that there was

6. "no evidence in the case of any defect in the fastenings or catch provided for holding the door open, nor of any negligence on the part of the brakeman in opening

the door or in adjusting the fastening; and no evidence on which you can find that the defendant was at fault in respect to the opening or closing of the door." The conductor testified that there was a catch to hold the door open; that in stopping the train, after the door had been fastened back for the stop, it was not usual for the train to jar the door loose, and for it to close; that he did not examine the catch that day, or the door as it was pushed open; that it was his duty to see that everything was in proper order. The engineer testified that when he stopped the train it was not usual for the door of the car to slam shut. One witness testified, in substance, that he was a passenger in the same coach in which appellee was riding, and as they were going into Goldsmith and the train was stopping appellee arose and started out of the car. He stepped into the doorway just as the train came to a final stop. It lurched forward, and witness saw appellee throw his hand, and immediately the door shut and caught his fingers. The lurch and the closing of the door were all done very quickly. He felt the effect of

the lurch. The law imposes upon the common carrier of passengers the burden of removing the presumption of negligence which arises from the happening of an accident which causes injury to a passenger. *Louisville, etc., R. Co. v. Hendricks* (1891), 128 Ind. 462, 464; *Indianapolis St. R. Co. v. Schmidt, supra*; *Pittsburgh, etc., R. Co. v. Higgs* (1906), 165 Ind. 694; *Knoefel v. Atkins* (1907), 40 Ind. App. 428. In the case of *Cleveland, etc., R. Co. v. Hadley* (1908), 170 Ind. 204, an action for injury through the falling of a window sash upon the passenger's arm, it was said: "It is the law, as already stated, that when appellee showed that she was injured without her fault, from a defective appliance of the car in which she was being transported as a passenger, a presumption of negligence arose against appellant, and remained for her benefit until negatived and overthrown by proof of other facts."

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Appellant cannot be heard to complain that the disagreement between an erroneous instruction given at its request with correct instructions given by the court of its

6. own motion, or upon the request of appellee, produces inconsistency in the instructions. Neither of the errors assigned by appellant is sustained.

Judgment affirmed.

KLEMM v. FREAD ET AL.

[No. 7,027. Filed March 17, 1910.]

1. DESCENT AND DISTRIBUTION.—*Lands Conveyed by Gift.*—*Statutes.*—Under §2997 Burns 1908, §2473 R. S. 1881, lands conveyed to an intestate by gift, or in consideration of love and affection, descend to the donor, if living, where such intestate leaves no husband, or wife, or children or the descendants thereof. p. 589.
2. DESCENT AND DISTRIBUTION.—*Husband to Wife.*—Under §3028 Burns 1908, §2490 R. S. 1881, a surviving widow takes her intestate husband's entire estate, where he left no child, father nor mother. p. 590.
3. STATUTES.—*Construction.*—*Aids to.*—The primary purpose in construing a statute is to determine the intent of the law-making body, and as aids in determining such intent, the court may consider the history of legislation on such subject, the purpose to be accomplished, and the construction courts have given to similar language. p. 590.
4. DESCENT AND DISTRIBUTION.—*Husband to Wife.*—*Lands Conveyed by Gift.*—Where an intestate leaves no children, or their descendants, father, or mother, lands conveyed to him by gift descend to his widow (§3028 Burns 1908, §2490 R. S. 1881), unless the donor survived the intestate, the donor's heirs not being included in the statutes (§2997 Burns 1908, §2473 R. S. 1881). p. 591.

From Franklin Circuit Court; *George L. Gray*, Judge.

Suit by Rebecca Klemm against Sarah E. Fread and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

F. M. Alexander, Walton S. Bowers and Harry S. Wonnell, for appellant.

Ferdinand S. Swift, Reuben Conner, Lon Conner and A. L. Chrisman, for appellees.

COMSTOCK, J.—Appellant filed her complaint in the court below for the partition of certain real estate. Said complaint sets forth, in substance, that appellant and certain appellees named therein, as heirs at law and next of kin of Hezekiah Hollowell, deceased, donor of the real estate in controversy to Marquis Hollowell, deceased, are the owners in fee simple as tenants in common of said real estate. The complaint further sets forth the respective interests of the parties, and alleges that Julia Hollowell claims to have some interest in said real estate as the widow of said Marquis Hollowell, and asks that she be required to set up any interest she may claim in said real estate, etc.

A demurrer for want of facts was overruled to the complaint, and Julia Hollowell filed her separate answer in two paragraphs, the first of which was afterwards withdrawn. In the second, she alleges that on December 4, 1883, Hezekiah Hollowell, named in the complaint, was the owner in fee simple and in the possession of the real estate described therein; that on said day said Hezekiah Hollowell and his wife, Julia A. Hollowell, executed to Marquis Hollowell, now deceased, a warranty deed for all of said real estate, and that said deed and acknowledgment read as follows:

“Know all men by these presents, that Hezekiah Hollowell and Julia A. Hollowell, * * * in consideration of natural love and affection, do hereby grant * * * to their son Marquis Hollowell, his heirs and assigns forever, the following real estate [describing it]. Said Hezekiah Hollowell and Julia A. Hollowell * * * reserve unto themselves the management, use, issues, rents and profits of said real estate, hereby conveyed during their natural lives, jointly and severally, and it is hereby expressly provided that the grantee and his heirs before taking possession of the real estate herein conveyed shall pay their proportionate share of the expenses incurred during the last sickness and burial of both of said grantors, and all the

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estate, title and interest of said Hezekiah Hollowell and Julia A. Hollowell, his wife, either in law or equity, of, in and to said premises, * * * to have and to hold the same to the only proper use of said Marquis Hollowell, his heirs and assigns forever.”

The answer further alleges that said deed was recorded on April 28, 1890, in the proper records of Franklin county, Indiana; that said Hezekiah Hollowell died on February —, 1888, and Julia Hollowell, on November —, 1892, and that Marquis Hollowell died intestate on August 1, 1906; that said Marquis Hollowell did not leave any child or children or their descendants, nor father or mother, surviving him; that appellee Julia Hollowell was the lawful wife of said Marquis Hollowell at the time of his death, and as his widow was his sole heir at law, and entitled to all the estate, real and personal, of which he was the owner at the time of his death; that said Marquis Hollowell well and truly performed all the conditions of said deed on his part; that, by virtue of the facts stated, she is the owner in fee simple and entitled to the possession of all the real estate described in plaintiff's complaint.

A demurrer to said second paragraph of answer was overruled, and appellant refusing to plead further the court found that plaintiff had no interest in the real estate described in her complaint; that defendant Julia Hollowell is the owner in fee simple, and that plaintiff should take nothing by her complaint; that defendant Julia Hollowell was the owner in fee simple, absolute, of all of said real estate, and that she recover from plaintiff her costs, etc.

The only error assigned is the action of the court in overruling said demurrer.

The law of the State of Indiana provides that an estate which shall have come to the intestate by gift or by conveyance in consideration of love and affection shall, if

1. the intestate die without children or their descendants, revert to the donor if living at the intestate's

death, saving to the widow or widower, however, his or her rights therein. §2997 Burns 1908, §2473 R. S. 1881. It is

also provided by the laws of this State that "if a hus-

2. band or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." §3028 Burns 1908, §2490 R. S. 1881. It is the contention of counsel for appellant that §2997, *supra*, provides and establishes the rule of descent of property under circumstances where such an estate came to the decedent by gift or by conveyance in consideration of love and affection, and is distinct and expressly excepted from the rules which prevail in ordinary cases, and from the general statutes of Indiana governing the line of descent and distribution of property, except those which give to the surviving widow or widower one-third; that said section does not affect the character or quantity of the estate, but was intended to affect only the course of descent, to designate a line of descent of property so acquired, and should govern in the case at bar; that that part of said section providing that under certain circumstances an estate shall "revert to the donor, if living at the intestate's death," should be construed to mean "to the donor if living, or to his heirs." So far as we are advised, the precise question here presented has not been passed upon by the Supreme Court or by this court. There are reported cases in which the court has been called upon to construe the section of the statute involved, but they have been cases in which the grantor only survived the grantee.

The primary purpose of the construction of a statute is to ascertain the intention of the lawmaking body which enacted it. In ascertaining such intent it is proper,

3. among other things, to consider the history of legislation upon that subject, the purpose to be accomplished and the construction courts have given similar words. "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradic-

tion of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence. This is done, sometimes, by giving an unusual meaning to particular words; sometimes by altering their collocation; or by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction, that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention." Endlich, *Interp. of Stat.*, §295.

The general rule of descent is that if the husband or wife die intestate leaving no child or children or their descendants, nor parents living, the whole of his or her prop-

erty goes to the survivor. §3028, *supra*. Section 2997, *supra*, creates an exception to this general rule, making the grantor of land, as to the land conveyed, an heir of the grantee under certain conditions. One of these conditions is that the consideration for the conveyance of the land must have been wholly love and affection. Another is that the grantee must have died intestate, leaving neither father, mother, child or descendants of a child, surviving. A third is that the grantor must have survived the grantee. *Wingate v. James* (1889), 121 Ind. 69; *Amos v. Amos* (1889), 117 Ind. 37. The language of §2997, *supra*, interpreted by its ordinary meaning, is not ambiguous nor indefinite, nor does it manifestly contradict the apparent purpose of the enactment. In the case of *Amos v. Amos*, *supra*, the court, after quoting the statute in question, said on page 38: "This statute makes provision for a peculiar class of cases and expressly excepts it from the rules which prevail in ordinary cases." In the case of *Wingate v. James*, *supra*, the court, after quoting the section of the statute in question, said: "A conveyance of land made by way of gift, or in

consideration of love and affection, creates in the grantee precisely the same estate as a like conveyance made upon a valuable consideration. The effect of the statute is not to reserve to the grantor an estate in reversion, or to annex a condition to the estate of the grantees. It simply declares who shall inherit the estate in case the grantee dies intestate, and without children or their descendants. It is true the language of the statute is, that the estate shall revert to the donor, if living, in case the grantee dies intestate without children. This, however, does not create an estate in reversion in the grantor, so as to vest in him a reversionary interest in the land during the lifetime of grantee, nor does it annex any condition to the estate of the latter. It simply declares that under certain contingencies the estate shall return to, or be cast upon, the grantor. The effect of the statute is to make the grantor, if living, the heir of the grantee in the absence of children or their descendants. The grantor succeeds to the estate by operation of law upon the death of the owner." The court committed no error in overruling appellant's demurrer to said second paragraph of answer. We have read the cases cited in the able brief of appellant, and find them not to warrant the interpolation in the statute of the additional words, "or his heirs."

Judgment affirmed.

CITY OF CRAWFORDSVILLE v. BROWN.

[No. 6,778. Filed March 18, 1910.]

1. **APPEAL.—*Special Proceedings.—Street Assessments.***—No appeal lies from a street assessment, unless the statute expressly authorizes it. p. 593.
2. **APPEAL.—*Street Assessments.—Statutes.***—Under §8716 Burns 1908, Acts 1905, p. 219, §111, providing that the report of the appraisers shall be final and conclusive, no appeal lies from a judgment of the circuit court fixing the street assessment in accord with the report of the appraisers appointed by the court to make a reassessment. p. 594.

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3. **APPEAL.—Jurisdiction.—Raising Question of.**—The Appellate Court can determine its jurisdiction over the subject-matter of an appeal, though the question is not raised by the parties. p. 594.

From Montgomery Circuit Court; *Jere West*, Judge.

Street assessment by the City of Crawfordsville against Eliza I. Brown. From a judgment, on appeal to the circuit court, reducing the amount thereof, the city appeals. *Appeal dismissed.*

Irvin C. Dwiggins, for appellant.

Clyde H. Jones and *John B. Murphy*, for appellee.

HADLEY, J.—Appellant sought to improve a certain alley within its corporate limits, under section 111 of an act of the General Assembly of 1905 (Acts 1905, p. 219, §8716 Burns 1908), and assessed benefits to pay therefor. Under the provisions of said act, appellee, upon the completion of the assessment roll and its delivery to the department of finance, appealed to the Montgomery Circuit Court, by his written verified petition, showing that the assessment on appellee's property was excessive, and asked the court to appoint disinterested freeholders to reassess such benefits.

Appellant demurred to the petition, the demurrer being overruled. Appraisers were appointed, a reassessment made, and appellee's assessment was reduced \$30, which was a reduction of more than ten per cent of the first assessment, and the court thereupon entered judgment against the appellant for costs and appraisers' fees. This appeal is taken from this alleged judgment.

The first question that arises for our consideration is our jurisdiction over such an appeal. This precise question was decided by the Supreme Court in the case of *Randolph v. City of Indianapolis* (1909), 172 Ind. 510.

In that case the court say: "It is well settled that the granting of appellate rights is a subject of legislative discretion, and the general right of appeal allowed from

final judicial judgments does not apply to special proceedings. Statutory provisions for the improvement of streets and other highways, and for the assessment of the costs thereof against the property benefited, are special in character, and unless expressly granted no appeal lies from any action or decision of a board or tribunal conducting such proceedings.”

The section of the act under which the appeal to the circuit court was taken provides that the report of the appraisers so appointed by said court shall be final and con-

2. clusive on all parties thereto. No appeal from such report of appraisers is specially authorized and none exists, and, as is said in the case of *Randolph v. City of Indianapolis, supra*, the circuit court in performing the acts required by said section is not exercising general jurisdiction, and its final determination is not an ultimate judgment in an independent judicial proceeding, but is taken in the exercise of assumed jurisdiction, and as an incident to the principal proceeding, which is administrative in its nature, and since no appeal is allowed from the granting or withholding of the primary object, it must be manifest that no appeal is authorized from any intermediate or incidental proceeding.

The question of our jurisdiction over the subject-matter has not been raised by either of the parties to this action;

but in all cases this court must first determine its
3. jurisdiction to hear and decide a case, whether or not the question is raised by the parties, as this is a question that cannot be waived. *Davis v. Davis* (1871), 36 Ind. 160; *Branson v. Studabaker* (1892), 133 Ind. 147; *Louisville, etc., R. Co. v. Johnson* (1879), 67 Ind. 546; *Fitch v. Long* (1902), 29 Ind. App. 463; *Everett Piano Co. v. Bash* (1903), 31 Ind. App. 498.

Since no appeal in this matter is authorized, we have no jurisdiction, and the appeal is dismissed.

DRESSEL v. LOBSTEIN ET AL.

[No. 6,640. Filed March 18, 1910.]

TRUSTS.—Conveyances.—Consideration.—Where certain persons appointed another to purchase certain lands, the deed to be taken in his name, the purchase money being furnished by them, a trust arises in their favor (§4019 Burns 1908, §2976 R. S. 1881), and they may require the sale of such land and a distribution of the proceeds.

From Starke Circuit Court; *John C. Nye*, Judge.

Suit by John G. Lobstein and others against Andrew H. Dressel and others. From a decree for plaintiffs, said Dressel appeals. *Affirmed.*

H. R. Robbins, for appellant.

C. C. Kelley and *W. A. Foster*, for appellees.

WATSON, J.—This is a suit to declare a trust. The complaint is in one paragraph, and alleges, in substance, that on February 13, 1899, appellees owned the land described in the complaint; that said land was sold by the treasurer of Starke county, Indiana, at a delinquent tax sale, to William B. Austin for \$105.82; that afterwards appellees each contributed \$31.70, and gave that amount to Andrew Dressel for the purchase of the tax certificate, and to have it transferred to his son, Andrew H. Dressel, for them; that Andrew Dressel gave the money so raised by appellees to his son, Andrew H. Dressel, with instructions to purchase the certificate, surrender it, and take a tax deed in his own name; that afterwards, on June 16, 1904, Philip J. Wetzel instituted proceedings to foreclose a mortgage on said real estate, making Andrew H. Dressel a party thereto, who set up his claim by way of cross-complaint to foreclose the tax lien represented by the tax deed so obtained by him, and recovered judgment for \$369.29 and a lien upon said land to secure said amount, to which appellees were not made parties. In October 1904, he caused to be issued an order of

sale on said decree. Said real estate was thereupon sold by the sheriff of Starke county on November 15, 1904. Andrew H. Dressel bid therefor the amount of his lien and costs, to wit, \$427.67, and afterwards received a sheriff's deed to said real estate. In addition to the contributions made by appellees, and prior to said foreclosure proceedings and sale, the personal property belonging to these appellees, to the amount of \$315, was sold and the money turned over to Andrew H. Dressel, with the agreement and understanding that it was to be used for the purpose of enabling him to pay the taxes and charges on said land and free it from said tax lien before named; that the money which Andrew H. Dressel paid for the sheriff's deed belonged to appellees, and was turned over to Dressel for the purposes as aforesaid; and that in all the transactions he acted solely as the trustee of said appellees. The interest of each party plaintiff and defendant is then set out. The prayer is that the property be declared as held in trust by said Dressel for said appellees, and that it be sold and the proceeds divided among appellees according to the interest of each as therein set out. A demurrer was overruled, exceptions were taken, and answer was filed in two paragraphs, (1) a general denial, and (2) setting up former adjudication and stating defendant's source of title. The court submitted certain facts to a jury. found the facts specially, and announced its conclusions of law thereon.

The assignments relied on for reversal are: (1) The overruling of appellant's demurrer to the complaint; (2) the complaint of appellees does not state facts sufficient to constitute a cause of action; (3) the court erred in the first conclusion of law; (4) the court erred in the second conclusion of law; (5) the court erred in overruling appellant's motion for a new trial.

The special findings disclose that John G. Lobstein, Sr., John Lobstein, Charles J. Hanke, Arthur D. Rehm, and the defendants, Andrew Dressel, Philip J. Wetzel, together with

Charles Rapp and Andrew Rehm, prior to and on February 13, 1889, were members of the Lake Grove Club, and at said time said club was the owner in fee simple of real estate in Starke county, Indiana (describing it); that on said day the taxes on said real estate became delinquent and the real estate was sold by the treasurer of said county to William B. Austin for \$105.82; that on February 10, 1901, said plaintiffs and defendants other than Andrew H. Dressel, met in the city of Chicago, and mutually agreed that each of said parties should bear his proportionate share of the expenses of redeeming the real estate from said tax sale, and each should, and did, contribute \$31.70 for such redemption; that they turned the money over to Andrew Dressel, who was to act as agent for himself and the other parties to procure the assignment of said tax certificate from said Austin, and that he should have it assigned to his son, Andrew H. Dressel, appellant herein, who was not a member of said club; that said Andrew H. Dressel was to hold it in trust for the parties who so contributed for said redemption; that thereafter William B. Austin assigned said tax certificate to Andrew H. Dressel, in pursuance of said agreement; that by said agreement Andrew H. Dressel received \$315 from the sale of certain personalty belonging to said club; that on March 19, 1901, Andrew H. Dressel surrendered said tax certificate to said land, which had been so assigned to him, and took a tax deed for said real estate; that on June 16, 1904, Philip J. Wetzel instituted foreclosure proceedings against said club, making Andrew H. Dressel a party; that in said suit Andrew H. Dressel, without the knowledge of plaintiffs or defendants, set up his apparent interest as shown by the record, by this assigned tax certificate and tax deed by way of cross-complaint, and in said suit sought to foreclose his apparent tax lien as represented by said tax deed; that he obtained judgment for the sum of \$369.29, and a decree declaring that his lien was prior to and superior to the mortgage interest of

Philip J. Wetzel; that on October 8, 1904, said Andrew H. Dressel caused an order of sale to be issued on said decree, and caused said land to be offered by the sheriff of said Starke county, Indiana, for sale, which was sold on November 5, 1904, and said Andrew H. Dressel bid for said real estate the amount of said lien and costs, to wit, \$427.67, and received a sheriff's deed therefor; that said Andrew H. Dressel has no interest in said real estate whatsoever, but holds it in trust for the use and benefit of said plaintiffs and his codefendants.

The court stated the law to be as follows: That the deed to said real estate is now held in trust by Andrew H. Dressel for the use and benefit of plaintiffs and defendants other than Andrew H. Dressel; that the land should be sold and the proceeds divided among the parties to this suit, other than Andrew H. Dressel, in proportion to their interests in the real estate herein found to exist.

Section 4012 Burns 1908, §2969 R. S. 1881, provides that "no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same." Section 4019 Burns 1908, §2976 R. S. 1881, provides that a trust arises in favor of a party or parties "where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein, in trust for the party paying the purchase money or some part thereof."

The complaint alleged that the real estate was purchased in the name of Andrew H. Dressel, with the money belonging to appellees, under and by virtue of an agreement therefore entered into by said appellees and said Andrew H. Dressel. Section 4019, *supra*, provides for just such a trust as is herein alleged to exist. Under the statute and the authorities the complaint was sufficient to withstand a demurrer. *McDonald v. McDonald* (1865), 24 Ind. 68; *Hampson*

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v. *Fall* (1878), 64 Ind. 382; *Hughes v. White* (1889), 117 Ind. 470; *Prow v. Prow* (1893), 133 Ind. 340; *Barber v. Barber* (1896), 146 Ind. 390.

The evidence is not in the record. We assume that it sustains the findings of the court. Under the averments of the complaint, and upon the findings of the court, appellant's claim is not based upon a legal reason, nor founded upon an equitable principle. Good conscience and common honesty forbid the establishment of appellant's claim. Upon the findings made the court did not err in its conclusions of law stated thereon, nor is the decision of the court contrary to law. We find no error for which this judgment should be reversed.

Judgment affirmed.

RAMAGE v. WILSON.

[No. 6,387. Filed June 22, 1909. Rehearing denied January 14, 1910. Transfer denied March 18, 1910.]

1. **APPEAL.**—*Briefs.*—*Waiver.*—Points not discussed are waived. p. 603.
2. **CONTRACTS.**—*Gas and Oil.*—The object of a contract for the sinking of oil and gas wells is to explore the land for oil and gas, and to develop the production thereof. p. 603.
3. **CONTRACTS.**—*Options.*—*Gas and Oil.*—Under a contract providing that the contractor shall "drill an additional well each sixty days, or pay \$1 per day for each and every day's delay over that time until three wells are drilled," and that the contractor "shall have the right to * * * cancel or annul this contract or any part thereof at any time," such contractor may not retain the gas and oil, and operate the two wells drilled, and cancel the contract so far as it affects other parts of the real estate, or requires the sinking of a third well. pp. 603, 604.
4. **CONTRACTS.**—*Oil and Gas.*—*Real Property.*—*Vested Interests.*—A contractor who sinks oil or gas wells under a contract giving to him a part of the gas or oil discovered, upon the discovery and development thereof, acquires a vested interest therein. p. 604.

From Grant Superior Court; *B. F. Harness*, Judge.

Ramage v. Wilson—45 Ind. App. 599.

Action by John W. Wilson against Samuel Y. Ramage. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Simmons & Dailey, for appellant.

Thomas B. Dicken and *Lett & Haisley*, for appellee.

WATSON, J.—This was an action by appellee to recover from appellant a certain sum of money alleged to be due under the terms of an oil and gas lease. The case was tried by the court. At the request of appellant the court made a special finding of the facts and stated its conclusions of law thereon. Upon the conclusions of law filed by the court judgment was rendered for appellee in the sum of \$286.

The following assignments are relied on for reversal: (1) The complaint does not state facts sufficient to constitute a cause of action; error (2) in overruling appellant's demurrer to the complaint; (3) in sustaining appellee's demurrer to the fourth paragraph of answer; (4), (5), (6), (7) in each of the conclusions of law stated by the court; (8) in overruling appellant's motion for a new trial; (9) in overruling appellant's motion to modify the judgment. The reasons assigned for a new trial were: (1) The decision is contrary to law; (2) error in overruling the motion to modify the judgment; (3), (4) excessive damages; (5), (6), (7) error in each of the conclusions of law stated by the court.

The special findings were, in substance, that on July 19, 1899, and subsequently thereto, up to and including the date of the filing of this cause, appellee was the owner in fee simple of certain described land in Grant county, Indiana. and on said date appellee and his wife leased said premises to Thomas McDonald. The material terms of said lease, as found by the court, were, in substance, that in consideration of \$25 appellee and wife granted and guaranteed to Thomas McDonald "all the oil and gas in and under the following described premises [describing them]," with the right to

enter for drilling purposes, and to erect and maintain necessary buildings and pipe-lines, appellee to have one-eighth of the oil produced and saved. It was further provided in said lease that, in the event no well was completed within fifteen months from the date of the lease, said grant should become null and void, unless the second party should thereafter pay \$1 per day for each day's delay. The lease contained the following specific provisions:

"Second party [appellant] also agrees to drill an additional well each sixty days, or to pay \$1 per day for each and every day's delay over that time till three wells are drilled.

The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time, and may cancel and annul this contract or any part thereof at any time.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns."

The lease was duly recorded. Thomas McDonald assigned the lease to the Emery Oil Company. This company drilled two wells on the east thirteen and one-third acres of the leased premises, but no other well was drilled on the real estate described, and no well has been drilled or completed on the six and two-thirds acres off the west end of said real estate. On January 28, 1903, the Emery Oil Company and Frank M. Johnson assigned said lease to appellant, and he was the owner of the lease and in possession of said premises thereunder on the date of the filing of this action.

The court further found that the lease provided for an additional well each sixty days, or the payment of \$1 per day for each day's delay over that time until three wells should be drilled, but that the third well had never been drilled. There was no payment of the \$1 per day for the period of 286 days, beginning December 1, 1903, and ending September 13, 1904. Appellant took possession of said

premises under the assignment, and continued in such possession up to and including the time of the filing of this action, for the purpose of operating the two wells located thereon. On January 20, 1904, appellant executed and acknowledged an instrument setting out the fact of the execution and several assignments of the said lease, and declaring further:

“Whereas, said S. Y. Ramage desires to be relieved from the payment of all further rental, or penalty, as provided in said lease, for a failure to drill a third well on the above-described premises, said S. Y. Ramage, therefore does hereby cancel and annul said contract and lease, so far as it grants and guarantees to said Thomas McDonald, his heirs, executors, successors and assigns, and to said S. Y. Ramage the right and permissions to drill a third or additional well or wells on said real estate, and said S. Y. Ramage hereby cancels and annuls all that portion of said contract which provides for the payment of \$1 per day for each and every day's delay over sixty days in completing wells under said lease, and especially for a failure to complete a third well under said lease, for the reason that two wells have been completed on said real estate under the terms of said lease, and have proven unprofitable, and the said S. Y. Ramage does not intend to drill or complete any third or additional well or wells on said real estate, and hereby declares that he will not hereafter hold the possession of said real estate for the purpose of drilling or completing a third or additional well or wells, but will only hold said lease and the real estate therein described for the purpose of running and operating said two wells now drilled and completed on said real estate.

And said S. Y. Ramage hereby cancels and annuls said contract and lease as to six and two-thirds acres of even width off the west end of said above-described real estate, described in said contract and lease, and hereby surrenders said six and two-thirds acres to said John W. Wilson, free from said lease and contract.”

The release was recorded and tendered to this appellee, but he refused to accept it. The court stated as its con-

clusions of law on said findings, that appellee should recover from appellant \$286, and that appellee be given judgment against appellant for said sum and costs.

The only assignments of error discussed by appellant in his brief are that the trial court erred in its conclusions of law stated upon the special finding of facts. The

1. other errors assigned are, therefore, deemed to be waived. *Indianapolis St. R. Co. v. Bolin* (1906), 39 Ind. App. 169; *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348; *Pittsburgh, etc., R. Co. v. Ross* (1907), 169 Ind. 3. The question for consideration here is, Did appellant, under the terms of the lease, have the power to cancel and annul the obligation to drill a third well on the leased premises? This court has held in a case between these same parties (*Ramage v. Wilson* [1906], 37 Ind. App. 532), in which case the same language was involved, that the words "and may cancel and annul this contract or any part thereof at any time" are seemingly uncertain, and "certainly ambiguous." In the same opinion this court further said: "When such ambiguity arises in a contract, the courts in the construction thereof will look to the intention of the parties as evidenced from the 'nature of the instrument, the conditions under which it was made, the situation of the parties, the nature of their business, the interest to be protected' (*Merica v. Burget* [1905], 36 Ind. App. 453), and the construction which may be developed by their acts and treatment of the contract." It is evident that the inten-

2. tion of the owner of the real estate in executing the aforesaid lease was to have the premises developed for gas and oil. *Ramage v. Wilson, supra*; *Gadbury v. Ohio, etc., Gas Co.* (1904), 162 Ind. 9, 62 L. R. A. 895.

For the purpose of the proper exploration and development of such estate it was specifically provided in the lease that appellant was "to drill an additional well each

3. sixty days, or pay \$1 per day for each and every day's delay over that time until three wells are

drilled." Under the rule of construction laid down, it is not reasonable to presume that the parties intended thereby that the grant of all the oil and gas under said premises should remain in force, and yet the lessee be permitted to alter the positive agreement to drill three wells in order to develop the land.

Upon the discovery of oil the lessee's interest became thereby a vested interest in the leased premises. *Ramage v.*

Wilson, supra; Carr v. Huntington Light, etc., Co.

4. (1904), 33 Ind. App. 1; *Heal v. Niagara Oil Co.* (1898), 150 Ind. 483; *Gadbury v. Ohio, etc., Gas Co.,*

supra.

The release does not purport to convey to the lessor the lessee's interest in the land, *i. e.*, the gas and oil thereunder, except so far as the release of the six and two-thirds

3. acres may be construed to be the release of all interest in the gas and oil under that tract of the leased land.

Since no question is raised as to the sufficiency of the release of said tract it is not necessary to consider it in this opinion. The release, by its terms, attempts to cancel and annul the contract so far as it grants the right to drill a third well, and also to cancel the obligation to pay \$1 per day for each day's delay over the specified time.

Lessee sets out as his reason for canceling these obligations, that the two wells drilled have proved unprofitable. It will be observed, however, from the release itself, that he desires to hold "said lease and the real estate described therein, for the purpose of running and operating said two wells now drilled and completed on said real estate." And this, in spite of the fact that he insists that the running of them is unprofitable. The release does not specifically regrant to the lessor the oil and gas under the premises. Neither can such a grant be implied from the terms of the instrument. It only attempts to cancel the lessee's obligation to develop the land or pay the alternative sum of money, according to the terms agreed between the parties. It is not

reasonable to interpret the terms of the lease as showing the intention of the parties to enter into a contract such as that contended for by appellant. It is true, as appellant contends, that he could have annulled or canceled the entire contract at any time, and surrendered the possession of the leased property, and thereby have been relieved from any future liability on account thereof, but this he did not do. He attempted to surrender and release six and two-thirds acres and retain possession of thirteen and one-third acres. Having retained possession of the thirteen and one-third acres he was not relieved from performing his part of the contract, to wit, to drill the third well, or pay, in lieu thereof. \$1 per day for each day in default thereof.

The contract is not to be construed as meaning that appellant may continue to take the profits of his lease, and yet refuse to drill the number of wells provided for by the positive terms of the lease. For these reasons, we find no error by the trial court in the conclusions of law stated on the special finding of facts.

Judgment affirmed.

FARMERS MUTUAL FIRE INSURANCE COMPANY
v. HILL.

[No. 6,674. Filed March 29, 1910.]

1. APPEAL.—*Briefs*.—*Waiver*.—Alleged errors not discussed are waived. p. 607.
2. INSURANCE.—*Policies*.—*Voidable*.—*Answer*.—In an action on a fire policy, an answer alleging that the assured, contrary to the company's rules of which he had knowledge, placed oil and gasoline in his barn, that he left stoves burning in such barn, and that such stoves set the barn on fire, thereby destroying it, is insufficient, there being no showing of a rescission of the contract because of the alleged breach, or any return, or offer of return, of the premiums or assessments received. p. 607.
3. INSURANCE.—*Fire Policies*.—*Violation of Rules by Assured*.—*Negligence*.—*Wilfulness*.—*Answer*.—An answer, in a fire insur-

ance case, that the plaintiff placed gasoline and oil stoves in the insured barn, and that he negligently and carelessly left them burning, in violation of his contract, and that he "wilfully and carelessly" left them burning, by reason whereof the barn was destroyed, does not show a wilful or intentional burning of the barn, and is therefore insufficient. p. 608.

From Noble Circuit Court; *Joseph W. Adair*, Judge.

Action by Wilbur H. Hill against the Farmers Mutual Fire Insurance Company, of Noble county, Indiana. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Fred L. Bodenhafer and *L. W. Welker*, for appellant.

T. A. Redmond, *L. H. Wrigley* and *R. W. McBride*, for appellee.

COMSTOCK, J.—Action upon a policy of fire insurance issued by appellant corporation to appellee on certain real and personal property owned by him. The complaint alleges the execution of the policy, the payment of all assessments, the destruction of the property by fire, and the performance by appellee of all the terms and conditions of the policy. The appellant answered in two paragraphs, each admitting the allegations of the complaint, but averring that by article sixteen of the rules and regulations set forth in appellant's constitution it is provided:

"This association will not insure in any incorporated cities, towns or villages, nor will this association insure any property, such as mills, blacksmith shops, tanneries, schoolhouses, churches or barns with stoves or furnaces, arches for fires, etc. They will insure threshing machinery when not in use, as contents of building only."

The first paragraph of answer avers that appellee, with knowledge of the rule before set forth, placed in his bank barn (one of the buildings insured), oil and gasoline stoves, filled the stoves with oil and gasoline, lighted them, and negligently and carelessly left them burning and unprotected; that they were burning when said bank barn caught fire and was burned; "that it was on account of

plaintiff's violation of said policy and the articles of association, rules and regulations of defendant company, by placing said stoves in said barn in such manner, that the barn, with its contents, was destroyed by fire." The allegations of the second paragraph of answer are similar to those of the first, except that the connection between the placing of the stoves in the barn and the destruction of the barn is thus alleged: "Plaintiff did * * * wilfully and carelessly place in said bank barn gasoline and oil stoves, and started fires therein, and left them burning in said barn, unprotected from, and setting fire to, combustible and inflammable matter in said building, which caught fire from said stoves, whereby said barn and its contents were burned, all of which was caused by plaintiff's negligence and carelessness in so placing said stoves in said barn and starting fire therein, as aforesaid, and not otherwise." Said first paragraph of answer, referring to the policy in suit, alleges that "defendant further admits that plaintiff paid all assessments made thereon," and a similar averment is in the second paragraph of answer. A demurrer for want of facts was overruled as to the complaint, and sustained as to each of said paragraphs of answer. The appellant refusing to plead further, the court rendered judgment in favor of appellee for \$1,432 and costs.

The errors relied upon for reversal challenge the sufficiency of the complaint and the action of the court in sustaining the demurrer to each of said paragraphs of

1. answer. The first specification of error is waived by failure to discuss it.

Appellee seeks to uphold the action of the court upon various grounds. We think it necessary to refer to but one of them, viz.: Each paragraph of the answer is bad

2. because of its failure to aver any rescission of the contract by appellant, or any tender or offer to return the premiums and assessments paid by appellee. Whether the rule referred to, and whether appellee's agreement in the

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policy to comply with the rules and regulations of the association, constitute a continuing warranty, as claimed by appellant, or whether it is, as contended by appellee, a rule adopted solely for the guidance of appellant's officers and agents in placing insurance, still, each of said paragraphs is insufficient upon the ground before stated. *Aetna Life Ins. Co. v. Bockting* (1907), 39 Ind. App. 586; *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 8 L. R. A. (N. S.) 708; *Modern Woodmen, etc., v. Vincent* (1907), 40 Ind. App. 711.

The first paragraph charges only that appellee placed the stoves in said barn, filled them with gasoline and oil, lighted them, and negligently and carelessly left them burn-

3. ing and unprotected, in violation of his said contract.

The second paragraph charges the same acts to have been done by appellee "wilfully and carelessly," and that the building caught fire from said stoves, all of which was caused by the wrongful act of appellee. These averments amount only to an allegation of negligence, and are not sufficient to avoid the obligation of the insurer upon the policy, because not coupled with the intention of the insured to destroy such property.

Judgment affirmed.

INDIANAPOLIS SOUTHERN RAILROAD COMPANY v. SHEA.

[No. 6,869. Filed January 5, 1910. Rehearing denied March 29, 1910.]

1. EMINENT DOMAIN.—*Railroads.—Damages to Frontagers.—Complaint.*—A complaint by the owner of a lot fronting upon a street over which defendant railroad company had constructed its track, alleging that the use of the street by such company totally destroyed the value of his house as a residence and "depreciated the value of said property" in the sum of \$5,000, shows that the market value of plaintiff's property was depreciated. p. 610.
2. EMINENT DOMAIN.—*Railroads.—Construction with Consent of Frontager.—Damages.—Answer.*—An answer alleging that the de-

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defendant railroad company constructed its track upon the street in front of plaintiff's lot, and that he consented thereto, is bad, in an action for the damages caused thereby. p. 611.

3. **APPEAL.—Briefs.—Setting Out Excluded Evidence.**—Whether the exclusion of certain evidence at the trial was prejudicial cannot be determined, where the excluded evidence is not set out in appellant's brief. p. 611.
4. **EMINENT DOMAIN.—Railroads.—Damages.—Measure of.**—The measure of damages to a frontager whose property abutted the street upon which defendant railroad company had constructed its road, is the difference in value of his property before and after the construction and operation of such road. p. 611.
5. **EMINENT DOMAIN.—Damages to Frontagers.—Instructions.—Applicability.**—In an action for damages against a railroad company for constructing its track upon the street in front of plaintiff's property, an instruction that such company can be compelled to construct switches and sidings necessary to accommodate elevators, mills and factories built along the line thereof, is not applicable. p. 612.
6. **WITNESSES.—Cross-Examination.—Collateral Questions.—Eminent Domain.—Damages.**—In an action against a railroad company for damages caused by constructing its road in front of the plaintiff's property, the trial court's refusal to permit a witness on cross-examination to be interrogated concerning the value theretofore by him placed on other property, does not show an abuse of discretion. p. 612.

From Marion Circuit Court (15,574); *Henry Clay Allen*, Judge.

Action by John Shea against the Indianapolis Southern Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

James E. Kepperly, Edgar A. Brown, Francis M. Springer, Blewitt Lee and J. M. Dickinson, for appellant.

Hefron & Harrington and John W. Kern, for appellee.

RABB, P. J.—The appellant is a railroad corporation owning a line of railroad entering the city of Indianapolis. It procured a franchise from said city, authorizing it to construct its railroad over and along McGill street in said city. It built its road over said street without acquiring the right

of way from the abutting real estate owners. Appellee owned a residence and business property abutting on said street over which appellant's road was built.

This was a common-law action brought by appellee to recover damages alleged to have been sustained by reason of injury to his said property, caused by the construction of said road over said street. Appellant's demurrer to the complaint was overruled. An answer was filed consisting of several paragraphs. Appellee's demurrer to the second paragraph of answer was sustained. The cause was put at issue, submitted to a jury for trial, verdict returned in appellee's favor, appellant's motion for a new trial overruled, and judgment rendered on the verdict.

Appellant's assignment of errors calls in question the ruling of the court below on the demurrer to the complaint, the demurrer to the second paragraph of answer, and

1. appellant's motion for a new trial. The objection urged against the complaint is that it fails to show by proper averments that appellee's property has been damaged by the construction of appellant's road. The averment in this respect shows that appellee had erected a dwelling-house upon his said property at the expense of \$5,000, which he occupied as a family residence, and that the use of the street by appellant for its railway totally destroyed the value of the house as a residence, and "depreciated the value of said property" in the sum of \$5,000. Appellant contends that it thus appears that the property is only damaged for residence purposes, and that it does not affirmatively appear that its market value is affected by the construction of appellant's road. The complaint is clearly not susceptible of the construction appellant contends for. The direct averment that the value of the property is depreciated \$5,000 can be understood only to mean its market value, the only value, when used in that connection, recognized by the law.

The second paragraph of appellant's answer avers that appellant's road was constructed along said street with the

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knowledge and consent of appellee. This fact was

2. not a bar to appellee's right to recover damages for the injury done to his property. *Porter v. Midland R. Co.* (1890), 125 Ind. 476; *Indiana, etc., R. Co. v. Allen* (1888), 113 Ind. 308, 3 Am. St. 650; *Indiana, etc., R. Co. v. Allen* (1888), 113 Ind. 581; *Indiana, etc., R. Co. v. Eberley* (1887), 110 Ind. 542, 59 Am. Rep. 225; *Chicago, etc., R. Co. v. Hall* (1893), 135 Ind. 91, 23 L. R. A. 231; *Pittsburgh, etc., R. Co. v. Harper* (1895), 11 Ind. App. 481.

On the trial of the case, appellant's witness Glenn testified as to the practicability of constructing a switch or side-track to connect appellant's railroad with appellee's

3. property. This testimony, upon appellee's motion, was, over appellant's objection, stricken out. Neither a verbatim copy, nor the substance of the testimony of the witness that was so stricken out, is set out in appellant's brief, as is required by the rules of this court, and we are not able to say from its presentation to us whether the ruling of the court was right or wrong, or whether harmful or otherwise to appellant.

It appears from the evidence that appellant laid its track along McGill street in December, 1905, but that its road was not completed nor were cars run over it until July,

4. 1906. Numerous witnesses were examined by appellee, who, without objection, testified to their opinion of the value of appellee's property before the railroad was constructed and its value after the road was constructed and cars were run over it. After this testimony had been thus admitted without objection, appellee was permitted, over appellant's objection, to give his opinion upon the state of facts, and this is complained of as a ground for reversal. No error intervened in this action of the court. The measure of appellee's damage was the difference in the market value of his property caused by the construction of appellant's road, and the road was not constructed until its parts were connected so that cars could be run over it. Proof of the

market value of the property immediately before the commencement of the construction of the road and its market value after its completion and operation tended to show how its market value had been affected by the construction of the road, and if the evidence tended in any degree, however small, to establish the fact, it was competent.

Appellant requested the court to instruct the jury as follows: "I instruct you that under the laws of the State of

Indiana, and of the United States of America, a common carrier can be compelled to connect with its lines, when the same can be done with safety and is reasonably necessary, all siding, switch, spur or turn-out tracks necessary to accommodate the business of any elevator, mill, factory or any other industry or enterprise that is now or may hereafter be constructed abutting the line of such carrier." The instruction asked for was properly refused. It could have no application to the evidence in the case. The jury was correctly instructed as to the rule it should apply in estimating damages.

Appellee's witness Welch was asked, on cross-examination, as to certain property owned by one Dugan, in reference to

the value of which witness had on some former occasion testified. Appellee's objection to this question was sustained. No reversible error can be predicated upon a ruling of this character. It was within the discretion of the trial court as to what limits should be placed upon the cross-examination of witnesses, and we cannot say in this case that there was an abuse of discretion. The same rule is applicable to certain questions asked appellant's witnesses upon cross-examination, which they were required to answer, and which ruling is complained of.

We find no reversible error in the record. Judgment of the court below affirmed.

**INDIANA NATURAL GAS AND OIL COMPANY v.
GANIARD, ADMINISTRATOR.**

[No. 6,754. Filed March 29, 1910.]

1. COVENANTS.—*Running with Land.—Gas and Oil Contracts.—Rentals.*—Covenants in a gas and oil contract requiring the payment of certain rent and the furnishing of gas for use in the owner's houses, run with the land. p. 617.
2. COVENANTS.—*Gas and Oil Contracts.—Rentals.—Gas.*—Agreements in a gas and oil contract to pay to the owner certain rentals until the sinking of a well, and to furnish gas free for his houses, are separate and unconditional, and where no time is fixed within which a well should be completed, such rentals are payable indefinitely until a well is completed. p. 617.
3. COVENANTS.—*Gas and Oil Contracts.—Furnishing Gas.—Failure.—Justification by Owner's Act.*—Where a gas and oil contract required the payment of certain rentals and the furnishing of free gas to the landowner, and upon demand the contractor refused to furnish such gas, the contractor is not justified in his refusal to pay the price of such gas by reason of the fact that the landowner brought suit to forfeit such contract by reason of such refusal. p. 617.

From Tipton Circuit Court; *J. F. Elliott*, Judge.

Action by Sidney K. Ganiard, as administrator of the estate of James W. Lee, deceased, against the Indiana Natural Gas and Oil Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. O. Johnson and Blackledge, Shirley & Wolf, for appellant.

Sidney K. Ganiard, A. R. Long and Jesse R. Coleman, for appellee.

MYERS, C. J.—On March 13, 1905, appellee's decedent brought this action against appellant, to recover damages for the alleged breach of a covenant in a contract to furnish gas free for use in the dwellings on certain land. From the complaint it appears that continuously since January 6, 1900, appellee's decedent was the owner of a certain described 112-

acre tract of land in Madison county, and during all of that time appellant held and owned what we shall call a gas contract on said land, by the terms of which all the oil and gas in and under said land was granted to appellant, together with other privileges, unnecessary here to set forth.

The vendee had twelve months from July 25, 1889, to drill a well, "or thereafter pay a yearly rental of \$56" until a well was drilled. Should oil be found the vendor was to have a certain portion of it, and in case gas was found he was to have \$200 yearly for each well from which gas was transported off the premises. The fourth and ninth clauses of the contract are as follows:

"(4) First party shall have, free of expense, gas from the well or wells, to use at his own risk, to light and heat the dwellings now on the premises, with pipe to conduct the same to said dwellings free of cost. * * * (9) Second parties agree to furnish gas to first party for use at his premises on or before November 15."

No well was ever drilled on said land. The yearly rental of \$56 was fully paid. Appellant refused to furnish appellee's decedent with gas for use in the dwelling, under the terms of the fourth and ninth clauses of the contract, and for this failure and refusal damages are demanded. Appellant answered in three paragraphs: (1) A general denial; (2) payment; (3) that by the provisions of clauses four and nine of the contract appellant was not bound to furnish appellee's decedent gas, except from wells drilled upon the premises; that no wells were drilled; that appellant was prevented by appellee's decedent from putting down a well, by denying its right to enter upon said land under the contract, and on December 17, 1900, brought a suit in the Madison Circuit Court against this appellant for the cancelation of said contract, asking that said contract be declared null and void and that his title be quieted as against it. On change of venue that suit was tried in the Grant

Circuit Court, and a decree entered quieting the title to said real estate against said contract, and declaring said contract null and void. From that decree an appeal was taken to this court. The decree was reversed, and the cause remanded to the Grant Circuit Court, where it remained on the docket until May 12, 1905, when it was dismissed. The reply was a general denial. The issues thus formed were tried by the court, and on September 18, 1907, a finding and judgment was rendered in favor of appellee for \$287.50. The record discloses that after the conclusion of the evidence, and before the judgment here appealed from was pronounced, plaintiff, James W. Lee, died, and this appellee was substituted as plaintiff.

Several errors are here assigned, but appellant states its contention as follows: "The sole question presented to the court in this case for argument is, Can a party, as appellee did in this case, wholly repudiate a contract which required a certain service to be performed, and keep up that repudiation, by obtaining judgment of court in his favor, for a number of years, and then collect damages because the service was not rendered?"

From the undisputed evidence in the record it appears that James W. Lee became the owner of the land in question on January 6, 1900. He resided upon said land and occupied it as a home with his family during all the time from the date of purchase up to the time of the trial. At the time he purchased the land it was subject to the contract in suit. No gas well had ever been drilled upon the land described in the contract. The "yearly rental of \$56" had been paid by appellant. On March 6, 1900, Lee, by his attorney, made a demand upon appellant to furnish him with gas, as provided in clause nine of said contract, and in case it failed to do so, or to make satisfactory arrangements in regard thereto, he would consider the contract forfeited. On August 24, 1900, he requested appellant to surrender and release of record

said contract, specifically describing it, and referring to the book and page of the records of Madison county, Indiana, where it had been recorded. On December 17, 1900, he commenced a suit to recover the value of the gas which appellant had neglected and refused to furnish him under clause nine of said contract, to have said contract declared null and void, and to quiet his title in said land against said contract. A trial of that case was had in the Grant Circuit Court, resulting in a decree in favor of said Lee for all of the relief demanded in his said complaint. That decree was afterward reversed by this court. The gas for fuel and lighting for said dwelling-house on said land was worth \$50 a year. No gas had been furnished and nothing whatever paid on account of the failure to furnish gas. Lee refused to receive the acreage rentals until February 28, 1905, which was after the decree in the Grant Circuit Court had been reversed by this court and the cause returned for further proceedings. From December 17, 1900, until said suit in the Grant Circuit Court was dismissed, he denied all rights of appellant under the contract in suit.

The complaint, and other proceedings had in the case commenced December 17, 1900, were admitted in evidence, and by reference thereto we find that one paragraph of that complaint counted upon appellant's failure to furnish gas for fuel and lights from January 6, 1900, to the beginning of that suit. This court held that complaint sufficient to withstand a demurrer for want of facts. The decree in that case was reversed because of the insufficiency of the second and fourth paragraphs of complaint. *Indiana Nat. Gas, etc., Co. v. Lee* (1904), 34 Ind. App. 119. Appellant has at all times insisted and still insists that the contract in question is valid and in full force and effect, but denies any liability under clauses four and nine, for the reasons before stated.

This identical form of lease was before the Supreme Court in *Indiana Nat. Gas, etc., Co. v. Hinton* (1902), 159 Ind.

398, and it was there held that the "agreements of the

1. lessees to pay the rent, and to furnish the lessor with gas to heat and light the dwellings on the premises demised, were covenants running with the land, and appellant, as the assignee of the lease, was bound to perform them. Its tenancy under the lease was acknowledged by its payment of the yearly rent of \$56 agreeably to the terms of that instrument, and, as assignee and tenant, it was charged with the performance of these conditions."

The covenant to furnish gas on or before November 15 to light and heat the dwellings, was unconditional, and was not dependent upon appellant's agreement to drill a well.

2. *Indiana Nat. Gas, etc., Co. v. Hinton, supra*. For by the payment and acceptance of the "yearly rental of \$56" the drilling of wells might be postponed indefinitely. *Consumers Gas Trust Co. v. Worth* (1904), 163 Ind. 141. No time limit is fixed by the contract in suit within which a well must be drilled. In *New American Oil, etc., Co. v. Troyer* (1906), 166 Ind. 402, it is said: "There being no definite time limit within which the well must be constructed, the law intervenes, and directs that it shall be accomplished within a reasonable time. This means within a reasonable time at the option of the landowner." And what is a reasonable time in such cases is usually a question of fact. *American, etc., Glass Co. v. Indiana, etc., Oil Co.* (1906), 37 Ind. App. 439. Again, in the case of *Indiana Nat. Gas, etc., Co. v. Hinton, supra*, it was said: "We think the covenant to furnish gas to heat and light the dwellings on the land was an independent agreement, and that the lessees, or their assignee, were liable for its breach."

That there was a breach by appellant of the covenant to furnish gas, and for which settlement has not been made, is undenied, but appellant seeks to avoid liability for

3. such breach by invoking the doctrine applied to relieve the operator under such contracts from expend-

ing money in drilling wells and exploring land for oil and gas, pending settlement, in cases where the landowner has declared a forfeiture of the contract. *Consumers Gas Trust Co. v. Worth, supra*; *LaFayette Gas Co. v. Kelsay* (1905), 164 Ind. 563; *Consumers Gas Trust Co. v. Ink* (1904), 163 Ind. 174. But, as a rule, questions of forfeiture of gas contracts, especially where no time limit is fixed within which a well must be constructed, are made to depend upon notice by the landowner to the operator to proceed to sink wells and an unreasonable delay on the part of the operator after notice.

No question is here made that the landowner in this case had waived the provision in the contract to furnish gas; but, on the contrary, it appears that for eleven months prior to December 17, 1900, he was demanding from appellant gas for fuel, as stipulated in the contract. It is clear, as disclosed by the record in this case, that the suit commenced December 17 was prompted and incited by appellant's failure and refusal to perform a positive agreement. A party should not be permitted to take advantage of his own default to defeat a liability created solely by such default, and such would be the effect of the rule which appellant insists that this court should declare. Appellant's reasons in support of this appeal are not well grounded.

Judgment affirmed.

BAKER ET AL. v. ANDERSON TOOL COMPANY.

[No. 6,491. Filed March 29, 1910.]

1. PLEADING.—*Complaint.—Demurring to Complaint After Answer.—Waiver.*—The filing of a demurrer to a complaint after the filing of an answer raises no question, where the answer is not first withdrawn by leave of court. p. 620.
2. NEW TRIAL.—*Excessive Recovery.—Motion to Modify Judgment.—Contracts.*—Where the amount of recovery, on a breach of contract, was too large, the question is properly raised by making such amount a ground for a new trial; and it is not necessary to move to modify the judgment. p. 621.
3. SURETYSHIP AND GUARANTY.—*Bonds.—Debts Contracted Prior to Execution of.*—Sureties and guarantors who agree to "guarantee the payment in full of any and all true accounts which may at any time be due * * * on account of merchandise shipped to" their principal, are not liable for preëxisting accounts for goods received. p. 621.

From Henry Circuit Court; *John M. Morris*, Judge.

Action by the Anderson Tool Company against Theodore Baker and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

H. C. Austill and *Wilkie & Wilkie*, for appellants.

Henry C. Ryan and *Marc Ryan*, for appellee.

WATSON, J.—This action was brought by the Anderson Tool Company against Theodore Baker, Francis E. Kramer and William A. Finch, in the Madison Circuit Court, from which it was taken on change of venue to the Henry Circuit Court and there tried without the intervention of a jury. Judgment was rendered in favor of appellee against appellants and William A. Finch in the sum of \$1,973.23, from which judgment Theodore Baker and Francis E. Kramer appeal to this court. The action is based upon a written bond of suretyship or guaranty, which bond is as follows:

"Whereas, S. A. Baker individually and in connection with W. A. Hawley, known as the Baker-Hawley Company, No. 578 Mission street, San Francisco, California, is receiving shipments of merchandise from the

Anderson Tool Company of Anderson, Indiana, and whereas said shipments are made to said Baker and said Baker-Hawley Company in trust for said Anderson Tool Company to be sold by said Baker or Baker-Hawley Company, and payment thereof to be remitted to said Anderson Tool Company, now therefore, we, the undersigned individually and collectively, bind ourselves to said Anderson Tool Company in the sum of \$1,000 each as surety and guaranty for the faithful performance of the agreement and obligations agreed to and assumed by said Baker and Baker-Hawley Company, and guarantee the payment in full of any and all true accounts which may at any time be due to said Anderson Tool Company on account of merchandise shipped to said Baker or Baker-Hawley Company.

Signed this 28th day of April, 1905.

Theodore Baker,
W. A. Finch,
Francis E. Kramer."

To the complaint defendants filed their answer in two paragraphs: (1) A general denial, and (2) a plea of payment, to which second paragraph of answer plaintiff replied in general denial.

After the cause was venued to the Henry Circuit Court, defendants filed their joint and several demurrers to the complaint, which were overruled and exceptions

1. taken. They then filed their answer in two paragraphs: (1) A general denial, and (2) a plea of payment, to which second paragraph of answer plaintiff replied in general denial. The answer filed in the Madison Circuit Court was not withdrawn by defendants. Under our statutes, as well as at common law, the demurrer precedes an answer to a complaint, and if the demurrer is not thus filed before pleading to the merits, it will be deemed to have been waived, unless the answer is withdrawn by leave of court. The answer was not withdrawn before the filing of the demurrer, nor at all. Therefore, the insufficiency of the complaint, if any, was waived. 1 Works' Prac. (3d ed.), §539; 1 Woollen, Trial Proc., §1544; *Gordon v. Culbertson* (1875), 51 Ind. 334; *Ludlow v. Ludlow* (1887), 109 Ind.

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199; *Morrison v. Ross* (1888), 113 Ind. 186; *Moore v. Glover* (1888), 115 Ind. 367; *Erhart v. Farmers Creamery* (1897), 148 Ind. 79.

It is insisted that appellants are not entitled to any relief, for the reason that no motion to modify the judgment was made. This is an action upon a contract, and is gov-

2. erned by §585 Burns 1908, §559 R. S. 1881, which provides that "a new trial may be granted in the following cases: * * * Fifth. Errors in the assessment of the amount of recovery, whether too large or too small where the action is upon a contract or for the injury or detention of property." The motion for a new trial in this cause, assigned as one of the grounds therefor that the assessment of the amount of recovery is erroneous, being too large. This correctly raised the question, and no motion to modify was necessary. *Bartlett v. Burden* (1894), 11 Ind. App. 419, 421; *Moore v. McPheeters* (1896), 16 Ind. App. 696; *Louisville, etc., R. Co. v. Renicker* (1897), 17 Ind. App. 619; *Cox v. Bank of Westfield* (1897), 18 Ind. App. 248; *Moore v. State, ex rel.* (1888), 114 Ind. 414, 422; *Queen Ins. Co. v. Studebaker Bros. Mfg. Co.* (1889), 117 Ind. 416, 420; *Davis v. Montgomery* (1890), 123 Ind. 587, 589; *City of Vincennes v. Citizens Gas Light Co.* (1892), 132 Ind. 114, 128; *Ewbank's Manual*, §§48, 71; 2 Woollen, Trial Proc., §4414.

The evidence discloses that the Anderson Tool Company knew on August 31, 1905, there had been a dissolution of the Baker-Hawley Company, and on September 5,

3. 1905, wrote a letter to said company in which it said: "We have your favor of the 31st, relative to the withdrawal of Mr. Baker from the Baker-Hawley Company." But neither Mr. Emanuel, appellee's superintendent, nor any one else was able to give the correct amount of the liability incurred by the Baker-Hawley Company with appellee from April 28, 1905, to August 31, 1905. Appellee continued shipments to the Baker-Hawley Company, which was given credit from time to time up to the settlement made by

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Mr. Emanuel in February, 1906, as shown by the itemized statement filed with the complaint. The summary of said itemized statement is as follows, to wit:

“Debits	\$7,134.65
Credits	3,053.42
	<hr/>
Balance	\$4,081.23
Credits by merchandise, allow-	
ance and claims on leases.....	\$1,958.00
Credits by cash, March 5, 1906....	50.00
Credits by cash, April 2, 1906....	50.00
	<hr/>
	\$2,058.00
	<hr/>
Balance due	\$2,023.23”

This, however, includes the debits and credits prior to April 28, 1905, when the bond sued on was executed to the Anderson Tool Company, and which were stricken out on motion of appellants. The debits for the amount of goods shipped to the Baker-Lynch Company prior to said date, which are included in this summary, were \$2,913, and the credits prior to said date were \$1,100.75, leaving a balance due from the Baker-Lynch Company to the Anderson Tool Company of \$1,812.25, which this bond did not cover and for which these appellants are in nowise liable.

We have concluded, however, under the evidence and under the circumstances of all the transactions between the parties, the only way to arrive at the amount due, and for which these bondsmen are liable, is to take the net debits of the Baker-Lynch Company from the net sum total claimed by appellee in its itemized statement to be due.

Amount due from Baker-Hawley Company..	\$2,023.23
Amount due from Baker-Lynch Company...	1,812.25

 \$ 210.98

In the addition of the credits of the Baker-Hawley Company, there was an error of sixty-seven cents. The total should be \$3,052.75 instead of \$3,053.42. This sixty-seven

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cents added to the \$210.98 would make \$211.65, the amount due, and for which these bondsmen are liable.

The court erred in not sustaining appellants' motion for a new trial. The judgment is reversed, with instructions to sustain the motion for a new trial.

JOSEPH SCHLITZ BREWING COMPANY ET AL. v. SHIEL.

[No. 6,713. Filed June 30, 1909. Rehearing denied January 14, 1910. Transfer denied March 29, 1910.]

1. NUISANCE.—*Maintenance of Saloon.—Complaint.*—A complaint attacked for the first time on appeal, alleging that defendants maintained a disorderly drinking saloon, offensive to the public, and privately injurious to the plaintiff, is sufficient, since it states facts sufficient to bar another suit for the same cause. p. 624.
2. NUISANCE.—*Damages.—Saloon.—Evidence.*—Evidence that the treasurer of a Milwaukee brewing company, residing at Milwaukee, owned a building in the business district of Indianapolis and rented it through a local agent to a saloon-keeper for saloon purposes, that his brewing company furnished its beer to such saloon-keeper who sold only that brand, that the owner discharged his rental agent and substituted as his agent the brewing company's agent, and that the saloon was afterwards carried on by the brewing company does not support a judgment for damages, nor a decree of injunction. pp. 624, 626.
3. NUISANCE.—*Saloon.—Location.—Business District.*—A saloon located in the business district does not constitute a nuisance *per se*. p. 625.
4. NUISANCE.—*Damages.—Saloon.—Landlord.—Notice.*—A landlord who rents property for saloon purposes is not liable for damages caused by the unlawful operation of a saloon thereon, unless he had notice of the misconduct; and such notice must be alleged and proved. p. 625.
5. EVIDENCE.—*Presumptions.—Burden of Proof.*—Every one is presumed to obey the law, and he who alleges against another an evil act or an evil intent has the burden of proving it. p. 626.

From Marion Circuit Court (14,681); *Henry Clay Allen*, Judge.

Suit by Roger R. Shiel against the Joseph Schlitz Brewing Company and another. From a decree for plaintiff, defendants appeal. *Reversed.*

Joseph Schlitz Brewing Co. v. Shiel—45 Ind. App. 623.

Linton A. Cox, William A. Pickens, Addison C. Harris
and *Miller, Mack & Fairchild*, for appellants.

Eli F. Ritter, for appellee.

RABB, J.—Appellee brought this suit in the court below against appellants, to abate a nuisance and recover damages for its maintenance. Appellants severally answered the complaint by general denial. The cause was submitted to the court for trial, and there was a finding and judgment in favor of appellee against appellants for \$900 damages, and a decree enjoining appellants, among other things, from maintaining a liquor saloon on the premises described in the complaint. Appellants' joint and several motion for a new trial was overruled, as was also their several motions to modify the decree. By their several assignments of error appellants call in question the sufficiency of the complaint and the correctness of the ruling of the court upon their motion for a new trial and to modify the judgment. The complaint is assailed for the first time in this court. The objections urged to it are that it proceeds upon the theory that the maintenance of a retail liquor saloon constitutes a nuisance *per se*, and that this theory being groundless the complaint should be held bad.

The facts averred in the complaint are sufficient to bar another suit for the maintenance of a disorderly drinking saloon, constituting a public nuisance, to the private

1. injury of appellee, and, this being true, we think it is sufficient to withstand appellants' attack upon it in this court, whatever may be the supposed theory of the pleader.

Appellants' motion for a new trial calls in question the sufficiency of the evidence to sustain the finding and decree of the court. It appears from the evidence that the

2. structure described in the complaint as No. 214 Indiana avenue, in the city of Indianapolis, is a three-story, brick building, and that its location is in the business

part of the city of Indianapolis, as distinguished from the residence district; that the lower room of this building has been used for the purposes of a retail liquor saloon for the past twenty years; that appellant Uehlein became the owner of the premises in March, 1899; that at that time and ever since said appellant has been a resident of the city of Milwaukee, and was then and up to the time the case was tried the treasurer of the Joseph Schlitz Brewing Company; that the premises up to a few days prior to the commencement of this suit was in the hands of one Ralston, a real estate agent, who looked after the renting thereof and the collecting of the rents, as agent for appellant Uehlein; that it was rented to be used for saloon purposes, and was so used; that appellant brewing company was not the owner of the premises, and had no interest therein, and so far as the evidence discloses, no connection therewith, except that beer of its manufacture was sold in said saloon by the proprietor thereof, not by the brewing company. The evidence fails to disclose that appellant Uehlein had any connection whatever with the business conducted on the premises, or that either he or his agent knew anything whatever about the manner in which the business was conducted. The building was one in which a liquor saloon might lawfully be

3. conducted. The locality in which it was situated was one in which a licensed liquor saloon might be carried on without being amenable to the charge that it was a nuisance, *per se*.

The only theory upon which the finding and decree of the court below can be sustained, is that the saloon was rendered a nuisance by the unlawful and disorderly manner in which it was conducted.

If it be conceded that the evidence shows that the saloon which is charged with being a nuisance was so con-

4. ducted as to constitute a nuisance, and to entitle appellee to wage suit against the party maintaining it,

it does not follow that appellants are liable. Here the nuisance, if it existed, was caused, not by the act of appellant Uehlein in renting his property for a saloon, but by the act of the tenant who carried on the business—not in the character of the business, but in the manner in which the business was conducted; and unless the evidence was such as to justify the inference that the landlord knew of, and was consenting to, the wrongful conduct of his tenant, he could not be held liable for his acts. It is elementary that no one can be held liable for a nuisance, unless the injurious consequences complained of are the natural and proximate result of his acts, or his failure to perform some duty. It is the well-settled rule that a landlord cannot be held liable for a nuisance created upon the demised premises by the tenant during the tenancy without the consent of the landlord. 18 Am. and Eng. Ency. Law, 243, and cases cited under note 5. If it were shown that Uehlein let his premises to a tenant for the purpose of conducting thereon a disorderly saloon, or for any other offensive purpose, he would be held liable. But there was no pretense of showing anything more than that appellant Uehlein rented his building for the purpose of a saloon. It is not to be presumed that he intended his tenant to use the premises to conduct a wrongful or offensive business. Every man is presumed to

obey the law and to do his duty, and he who alleges

5. against another an evil act or an evil intent has the burden of affirmatively showing the fact alleged.

It is true in this case that the evidence tends to show that for a few days immediately before the bringing of this suit one Schmidt was made the agent of Uehlein, to take

2. charge of the property, in the place of Ralston, and that Schmidt was at the same time made the agent of the brewing company for the sale of its beer in said city, and would perhaps justify the inference that defendant Uehlein was consenting that defendant corporation, of which he was the treasurer, should use this building for the pur-

Indiana Match Co. v. Kennedy—45 Ind. App. 627.

pose of selling its beer, and that the business was thereafter carried on in the building by the brewing company. But there is no evidence that for the few days that intervened between the time Schmidt took charge of the premises and the time the suit was brought there was any offensive conduct in connection with the operation of the saloon that would justify the court in declaring it a nuisance, and no evidence that would justify a judgment in favor of appellee for \$900 damages, as against either of the parties.

The judgment is reversed, with instructions to the court below to grant a new trial.

Hadley, C. J., Comstock, Myers and Watson, JJ., concur.

Roby, J., not participating.

INDIANA MATCH COMPANY v. KENNEDY.

[No. 6,565. Filed January 12, 1910. Rehearing denied March 30, 1910.]

1. MASTER AND SERVANT.—*Defective Machinery.—Proximate Cause.*—The failure to use a different kind of a machine can be only a remote or speculative cause of an injury sustained because of a defect in the machine actually used. p. 631.
2. MASTER AND SERVANT.—*Several Acts of Negligence.—Proof of One.—Complaint.*—Where several acts of negligence are alleged to be the proximate cause of a servant's injuries, proof of one of such acts will sustain a recovery, unless the pleading proceeds upon the theory that all the alleged acts of negligence combined caused the injury. p. 631.
3. MASTER AND SERVANT.—*Several Acts of Negligence.—Proximate Cause.—Complaint.*—A complaint alleging that the plaintiff's injuries were the proximate result of defendant's negligence in maintaining the gear of a machine in a specified, defective condition, and in maintaining a gearing that was dangerous and unsafe, is sustained by proof of the existence of one of such allegations of negligence. p. 631.
4. TRIAL.—*Instructions.—Imperfections.—Appeal.*—Where the jury was fairly instructed upon the merits of the case, mere imperfections in some of the instructions which did not mislead the jury, are not cause for a reversal. p. 632.

From Montgomery Circuit Court; Jere West, Judge.

Indiana Match Co. v. Kennedy—45 Ind. App. 627.

Action by Henry C. Kennedy against the Indiana Match Company. From a judgment for plaintiff for \$2,750, defendant appeals. *Affirmed.*

Kumler & Gaylord, for appellant.

O. C. Jarvis, Clyde H. Jones and John B. Murphy, for appellee.

MYERS, C. J.—The appellee brought this action to recover for a personal injury suffered by him while in the employ of appellant in its match factory. There were three paragraphs of the complaint. Judgment was rendered in favor of the appellant on the first and third paragraphs and against it upon the second paragraph.

The overruling of appellant's motion for judgment in its favor upon the second paragraph, on the special findings of the jury in answer to interrogatories, notwithstanding the general verdict, is assigned as error, as is also the overruling of its motion for a new trial.

In support of the motion for judgment on the answers to interrogatories, it is insisted that while the second paragraph of complaint charges two several negligent acts of appellant as having jointly, by their combined effect, produced the injury, it appears by the answers to the interrogatories that only one of such negligent acts was the proximate cause. The second paragraph is very long, and includes a description of a machine not easily described briefly. Appellee was in charge of a "dipping machine," by means of which the heads were put upon the matches by passing crates containing upright sticks, or matches without heads, between two rollers, from one of which the sticks received the composition constituting the match heads. It was proper and necessary for the person operating the machine occasionally to remove with his hand from the receptacle the splinters and pieces of wood dropped as the crate passed between the rollers, for which purpose it was necessary to stop the

machine by throwing it out of gear. The defect which caused appellee's hand to be caught and injured was attributed to that part of the machine by which its motion was stopped, which, by reason of its defectiveness, was apt to throw the machine in gear and to put it in motion automatically, while the operator was removing the refuse.

The machine was constructed with a gearing connecting it with a large sprocket-wheel, and the complaint alleges that the machine had what is known as a square notched clutch gearing, and that by means of a lever and a square notched clutch the gearing could be pushed backward and forward, throwing the machine in or out of gear as the operator chose; that the gearing had attached thereto a perpendicular iron bar running from the lower portion of the clutch to a horizontal bar which was attached to the lower portion of the lever used in throwing the machine in or out of gear; that the gearing was negligently constructed, in that the horizontal bar which connected the lever with the perpendicular bar was too short, and by reason thereof when the lever operating the gearing was pulled out, in order to throw the machine out of gear, the lever would drop past the center, thereby throwing the machine in gear.

The complaint further alleged "that said notched clutch gearing which defendant had on said machine for the purpose of throwing it in and out of gear, when properly constructed was not a safe gearing for said machine, and was not the kind of gearing in general use on like machines;" that the only safe and reliable gearing for such a machine, as defendant well knew, was a gearing known as the friction gearing; that the gearing used was not, as defendant well knew, adapted for the use to which it was applied, but that defendant negligently allowed said machine to be and remain in said unsafe and dangerous condition; that if said horizontal bar had been of sufficient length said machine would not have been dangerous, and the accident in question would

not have happened; that the plaintiff's injury was "the direct and proximate result of the negligence of defendant in maintaining the gearing of said machine in its defective condition, as hereinbefore alleged, in maintaining on said machine a gearing that was dangerous and unsafe and not adapted for the use to which defendant was applying it, and in directing plaintiff to operate said machine in its dangerous and defective condition."

The jury specifically found, among other facts, that the horizontal bar was not of proper length, that it was defective, that the lever fell and thereby put the machine in motion, that the shortness of the horizontal bar caused the lever to drop, and that the machine would not have started or appellee have been injured if the lever had not fallen. Appellant lays stress upon the allegation in the complaint, "that said notched clutch gearing, which defendant had on said machine for the purpose of throwing the same in and out of gear, when properly constructed was not a safe gearing for said machine," etc. The jury found specially that the machine was provided with the kind of gearing, bars and levers in general use; but the jury also found that appellant knew, or by the exercise of reasonable care should have known, that the "machine was defective in that it was equipped with a notched clutch gearing," and appellant scarcely could be said to have had such knowledge, if the machine was not defective by reason of the kind of gearing used. It is not alleged in the complaint that the injury was caused by a machine properly constructed or by the failure to use the friction gearing; but the cause of the injury is shown to have been the defective, dangerous and ill-adapted machinery actually used, which was not properly constructed.

The failure to use a machine of a different kind could not be more than a remote and speculative cause of the injury occasioned directly by the specific defect in the machine

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actually used, without which specific defect the injury would not have occurred. The settled rule in this State authorizes the plaintiff in an action for damages for injuries caused by the negligence of the defendant to plead more than one act of negligence in the same paragraph, "and upon the trial it is sufficient if he prove such negligence charges as will establish his case, and this may be a single act of negligence." *New York, etc., R. Co. v. Robbins* (1906), 38 Ind. App. 172; *New York, etc., R. Co. v. Callahan* (1907), 40 Ind. App. 223; *Chicago, etc., R. Co. v. Barnes* (1905), 164 Ind. 143. And where several acts of negligence are charged this rule will prevail, unless it clearly appears that the pleading "proceeds upon the theory that all the alleged acts of negligence combined caused the accident." *New York, etc., R. Co. v. Robbins, supra*.

In the case at bar, it is alleged "that said injury * * * was the direct and proximate result of the negligence of defendant in maintaining the gear of said machine in its defective condition as hereinbefore alleged, and in maintaining a gearing on said machinery that was dangerous and unsafe." Appellant insists that this allegation makes the shortness of the horizontal bar and the notched clutch gearing jointly the proximate cause of appellee's injury, and the jury having found that the injury was caused by the shortness of the horizontal bar alone, it follows that its motion should have been sustained. We are not persuaded that the facts bring this case within the rule appellant seeks to have applied, for, in our opinion, the complaint cannot be said to show such inter-dependent negligent acts combining to produce the injury approximately as to render inconsistent with the general verdict the special findings that the injury was caused by the defectiveness of the horizontal bar, and would not have occurred if it had been of proper length.

Appellant, in support of its motion for a new trial, contends that two of the instructions given to the jury were erroneous. We have read these instructions in con-

4. nection with the many other instructions given to the jury, some by the court upon its own motion, and others upon request of the parties, and have considered them in connection with the special findings of the jury, and we are unable to conclude that the jury was misled by the instructions in question. The jury was fairly instructed upon all the questions involved. If the instructions in question might properly have been fuller and clearer, yet the special findings show that what was missing therein did not fail to receive proper consideration. *Ohio Oil Co. v. Detamore* (1905), 165 Ind. 243; *Indianapolis St. R. Co. v. Schomberg* (1905), 164 Ind. 111; *Union Traction Co. v. Pfeil* (1906), 39 Ind. App. 51; *Posey County Fire Assn. v. Hogan* (1906), 37 Ind. App. 573.

Judgment affirmed.

INDIANA UNION TRACTION COMPANY v. OHNE.

[No. 6,729. Filed October 27, 1909. Rehearing denied January 5, 1910. Transfer denied March 30, 1910.]

1. CARRIERS.—*Passengers.*—*Contributory Negligence.*—*Instructions.*—*Jury.*—An instruction that if the plaintiff received any of her alleged injuries by reason of the collision of two of defendant interurban railroad company's cars, while she was a passenger, and that if, at the time of the collision, she were seated and had nothing to do with causing the collision, she would not be guilty of contributory negligence, is not an invasion of the province of the jury, nor was it prejudicial to defendant. p. 634.
2. CARRIERS.—*Passengers.*—*Injuries.*—*Aggravation of, by Passengers.*—*Contributory Negligence.*—The subsequent aggravation of an injury received by a passenger because of the carrier's negligence does not constitute contributory negligence. p. 634.
3. CARRIERS.—*Passengers.*—*Injuries Exciting Predisposition to Disease.*—*Instructions.*—An instruction that if the plaintiff's predisposition to disease was developed exclusively by injuries negli-

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gently indicted by defendant interurban railroad company, while she was a passenger upon defendant's car, she is entitled to recover, is not harmful. p. 635.

4. TRIAL.—*Instructions.—Inapplicability.*—Instructions not applicable to the evidence should not be given. p. 635.
5. TRIAL.—*Instructions.—Duplication.*—An instruction requested, covered by one given, should be refused. p. 636.
6. CARRIERS.—*Passengers.—Accidental Injuries.*—A carrier is not liable for purely accidental injuries sustained by a passenger. p. 636.
7. CARRIERS.—*Passengers.—Injuries.—Wet Rails.*—Interurban railroads are bound to anticipate, and take precautions to avoid, the dangers due to wet tracks and climatic conditions. p. 636.
8. TRIAL.—*Instructions.—Argumentative.*—Argumentative instructions are properly refused. p. 637.
9. DAMAGES.—*Excessive.—Negligence.*—A judgment for \$4,000, in favor of a woman thirty-five years old, permanently injured in her health by the negligence of an interurban railroad company, while she was a passenger on its car, is not excessive. p. 637.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by Mayme Ohne against the Indiana Union Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

James A. VanOsdol, *W. A. Kitlinger* and *Brill & Harvey*, for appellant.

M. M. Bachelder, for appellee.

RABB, J.—This appeal is from a judgment in favor of appellee, in an action brought by her to recover damages for personal injuries alleged to have been sustained by her, through the negligence of appellant.

The grounds relied upon for reversal are the action of the court below in giving to the jury, over appellant's objection, appellee's instructions six and eight, in refusing to give instructions three, six, fifteen, twenty-one and twenty-five requested by appellant, in refusing to permit appellant to ask appellee, while testifying as a witness in her own behalf, whether on the former trial of this cause she had testified that down to the time of the accident, she was a healthy woman, and in refusing to permit appellant to ask

appellee's husband, while testifying in her behalf, as a witness upon the trial, whether on the evening of the accident she had requested that he go for a physician, and also that the damages assessed are excessive.

Instruction six, given by the court on appellee's motion, and over the objection of appellant, told the jury that if it should find from the evidence that plaintiff received

1. any of the injuries, as alleged in her complaint, by reason of the collision between two of defendant's cars, while she was a passenger on one of them, and if it should further find that at the time of the collision appellee was sitting on a seat in said car, provided for the use of passengers, and had nothing to do with causing said collision, then it should find that plaintiff was not guilty of contributory negligence. It is contended that this instruction invaded the province of the jury, and that it was for the jury to determine whether appellee, under all the circumstances developed by the evidence, was guilty of contributory negligence. We think no harmful error was committed on this score. If the facts were as the instruction assumed them to be, appellee could have been guilty of no contributory negligence bringing about the accident alleged to have resulted in her injury; but it is insisted that while appellee may have been guilty of no negligence producing the injury, yet she may have been guilty of negligence subsequent to receiving the injury which had the effect of aggravating such injury.

Negligence of this character cannot properly be characterized as contributory negligence. Such aggravated injury

is not a result the law contemplates will be brought

2. about by contributing acts of negligence of plaintiff and defendant, but if such an aggravation of the injury takes place it must be from the independent negligence of plaintiff. Contributory negligence is a term that is properly applied to acts of negligence on the part of plaintiff that may have contributed to bring about the in-

jury complained of. *Louisville, etc., R. Co. v. Falvey* (1886), 104 Ind. 409; *City of Goshen v. England* (1889), 119 Ind. 368, 5 L. R. A. 253. The instruction was not harmful if not strictly correct.

Instruction eight told the jury that if plaintiff received the injuries or any part of them in the manner alleged in the complaint, and she was predisposed to any of the

3. diseases of which she alleges in her complaint she is now suffering as a result of said injuries, but that she was otherwise in good health, and it finds that said injuries, or any of them, solely excited or developed said predisposition to disease, or "that thereby without the fault of plaintiff her present condition, whatever you may find it to be, has directly resulted, then I instruct you that plaintiff is entitled to recover the full extent of whatever you may find her present condition to be, if you find she is entitled to recover in this action." This instruction is scarcely intelligible, but if the jury could make any sense of it at all, it must have understood therefrom that for whatever damages appellee suffered on account of her then diseased condition, the development of which was due exclusively to injuries she received through the negligence complained of, she was entitled to recover, notwithstanding a predisposition to such diseases. The jury was clearly and correctly instructed as to the proper measure of damages, and could not have been misled by this involved instruction.

Instruction three requested by the appellant was not applicable to the evidence in the case, and while it correctly states an abstract proposition of law, instructions

4. given by a court to a jury are intended to direct the mind of the jury to the precise issue or fact, which they are to determine, and not to deal in general elementary rules of law that have no application to the question the jury is to decide.

Instruction six, requested by appellant, so far as it was proper to be given, was covered by other instructions given

by the court. Instruction fifteen was as follows:

5. "If you find from the evidence in this case that, at the time of the injury complained of, defendant was running cars from the city of Indianapolis to Broad Ripple and White City; that the defendant's cars were in good condition; that there were no defects therein; that the car upon which plaintiff was riding was in good condition, and that the car which ran into said car upon which plaintiff was riding was also in good condition; that defendant's motorman on said car commenced turning off the power and applying the brakes about five hundred feet, or a distance sufficient to stop said car, before coming in contact with the car upon which plaintiff was a passenger, and at a distance of four or five hundred feet from said car upon which plaintiff was a passenger, and in which he afterward came in contact; that the track was down grade; that it was raining and the rails of the track slick; that the wheels of said car ceased to revolve on the application of the brake, and on account of the slickness of the track, by reason of the rainfall upon the rails of the track, the wheels slid upon said rails instead of revolving, and that such condition could not reasonably have been anticipated by defendant in time to prevent said car from running against the car ahead of it; that the same was purely accidental and not otherwise—then, in such case, plaintiff cannot recover in this action."

The jury was properly instructed that if plaintiff's injury resulted from a pure accident, then defendant was not guilty of negligence, and there could be no recovery.

6. So far as the residue of this instruction was concerned, it was properly refused. Defendant was not entitled to an instruction that it was not liable if the accident resulted because the rails were wet and the car slid.

All persons engaged as common carriers are bound

7. to anticipate such changes in weather conditions as are common to the climate or country in which the

service is carried on, and provide against them. *Cleveland, etc., R. Co. v. Heath* (1899), 22 Ind. App. 47.

The jury may well have found that defendant, by the exercise of the degree of diligence required of it, under the circumstances disclosed by the evidence, could have provided means to prevent the cars from skidding or sliding on the wet rails.

Instructions twenty-one and twenty-five, requested by defendant, each consisted of the marshaling of a number of facts, presumably appearing in the evidence, calling

8. the special attention of the jury to these items of evidence and informing the jurors that they could take these particular matters into consideration in the determination of certain facts involved in the issues, and were in the form of an argument by the court on behalf of the party these particular items of evidence enumerated would most favor. It possibly would not have been error had the court given the instructions as asked, but it certainly was proper to refuse them.

The question which appellant complains it was not permitted to ask appellee upon cross-examination, we find, after a tedious search of the record, to have been propounded and answered, and the same is true with reference to the question which appellant complains it was not permitted to ask appellee's husband on cross-examination.

We are asked to reverse the judgment because the damages are excessive. There was evidence from which the jury might have found that the genital organs of appellee were

9. injured as a result of the accident in question, to such an extent as permanently to affect her health, that otherwise she would have been a reasonably vigorous woman, and that she was thirty-five years of age. The jury allowed \$4,000 as damages. The question of fixing damages is so exclusively for the jury that this court is not empowered to correct any mistake it may have made, unless we can say at

first blush that the verdict is so shockingly unjust that it must have been the result of mistake or prejudice on the part of the jury. This we are unable to say from the case made by the record. We find no reversible error in the record. Judgment affirmed.

CITY OF CANNELTON v. BUSH.

[No. 7,233. Filed March 31, 1910.]

1. NUISANCE.—*Open Sewers.—Cities.—Complaint.*—A paragraph of complaint alleging that defendant city maintained an open ditch into which it discharged sewage, that such ditch was in the rear of plaintiff's lot and that offensive odors arose therefrom, to plaintiff's damage, is sufficient, though it fails to allege that it was defendant's duty to keep such ditch clean. p. 640.
2. NUISANCE.—*Definition.*—"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," is a nuisance (§291 Burns 1908, §289 R. S. 1881). p. 641.
3. NUISANCE.—*Action.—Parties.*—Any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, may maintain an action therefor. p. 641.
4. NUISANCE.—*Sewers.—Complaint.*—A paragraph of complaint alleging that defendant city discharged sewage into an open ditch at the rear of plaintiff's lots, rendering them less desirable for building purposes, and worthless for garden purposes, to plaintiff's damage in the sum of \$500, is sufficient. p. 641.
5. NUISANCE.—*Sewers.—Injury to Lots.—Complaint.*—A paragraph of complaint alleging that defendant city discharged sewage into an open ditch at the rear of plaintiff's lots, rendering them less desirable for building and garden purposes, and that plaintiff purchased one of such lots on the day of the filing of the action, is sufficient, since the other lots were alleged to be damaged. p. 641.
6. APPEAL.—*Errors Relied Upon.—Waiver.*—Where appellant relies upon errors in the complaint for a reversal, an alleged error in the overruling of the motion for a new trial may be regarded as waived. p. 642.

From Perry Circuit Court; C. W. Cook, Judge.

Action by Stella Bush against the City of Cannelton. From a judgment for plaintiff, defendant appeals. *Affirmed.*

John W. Ewing and William M. Waldschmidt, for appellant.

W. A. Land, for appellee.

COMSTOCK, J.—Action to abate a nuisance and for damages for its maintenance. The complaint consisted of three paragraphs, to each of which a demurrer for want of facts was overruled. The cause was put at issue, and upon trial by jury a verdict was returned in favor of appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict that appellee recover damages in the sum of \$25, that the nuisance described in the complaint be abated, and that appellant be forever enjoined from maintaining such nuisance on said premises.

The errors assigned challenge the sufficiency of each paragraph of the complaint. In each paragraph it is alleged that defendant is a corporation, incorporated under the laws of the State of Indiana, and that plaintiff is the owner of parts of lots No. 156 and No. 157 in block No. 6 in said city. The alleged nuisance complained of in the first paragraph is that defendant built and constructed a certain sewer in said city which empties into a ditch at or near the corner of Fourth and Adams streets; that said ditch is immediately in the rear of plaintiff's dwelling situated on the real estate described in her complaint; that defendant has carelessly, negligently and wrongfully allowed said ditch to clog and fill up with the filth carried through said sewer and into said ditch, thereby causing offensive odors to arise therefrom, to the great annoyance, vexation, pain and suffering of plaintiff and the members of her family, and to her damage in the sum of \$1,000.

The alleged nuisance charged in the second paragraph is that defendant does now maintain, and for many years last past has maintained, an open ditch and sewer, which said ditch and sewer passes through and upon the lots of plaintiff; that said sewer and ditch is a part of the sewerage sys-

tem of defendant; that into said open ditch and sewer and upon the plaintiff's lot is emptied the contents of the underground sewers of said defendant; that foul and offensive matter throughout said city is emptied into said open ditch and sewer and upon plaintiff's lot; that said lots would be desirable for building purposes were it not for the matters and things before alleged; that during the heavy rains said ditch and sewer overflows and carries the filth and offensive matter out of said ditch and sewer and upon plaintiff's lots, and renders them worthless for garden purposes. Wherefore, plaintiff has been damaged in the sum of \$500.

Said third paragraph further alleges that, in addition to the lots mentioned in the first and second paragraphs, plaintiff is the owner of lot No. 247 in block No. 9 and lots No. 59 and No. 155 in block No. 6 in said city of Cannelton; that plaintiff became the owner of said lot No. 155 on October 13, 1906; that defendant has constructed, and for many years past has maintained, and does now maintain a large sewer from which the defendant empties its sewage, refuse, deleterious, decayed and offensive matter into an open ditch, which ditch runs across plaintiff's lot and near the rear of her dwelling-house, and said city also keeps and maintains another sewer which leads from ——— street into said open ditch in said city; that said ditch and said sewers run across and in the rear of plaintiff's said lot, and carry the filth and sewage and foul and decayed matter and the bodies of dead animals which have been thrown into said sewer across and in the rear of plaintiff's said lot; that said lot No. 155, before described, is valuable for building purposes, but on account of said filth emptied into said open ditch it is rendered unfit for such building purposes, to plaintiff's damage, etc.

The objection made to the first paragraph of complaint is that it fails to allege that it is the duty of defendant

1. to keep the ditch clean. Such allegation is unnecessary. It is the duty of a municipal corporation so to

maintain its drainage as to prevent injury to property or the owners thereof. It has no right to allow a ditch which it has constructed for the purpose of drainage upon the land and near the dwelling-house of a citizen to fill up and become clogged with offensive matter and sewage, to the annoyance and discomfort of the property owner.

“Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable

2. enjoyment of life or property” is a nuisance. §291

Burns 1908, §289 R. S. 1881. “If the injury were limited to an individual, it gave a private right of action; if it affected the public, it was the subject of a public prosecution.” *State v. Taylor* (1868), 29 Ind. 517. See, also, *Acme Fertilizer Co. v. State* (1905), 34 Ind. App. 346, 107 Am. St. 190. “Such action may be brought by any

3. person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.” §292 Burns 1908, §290 R. S. 1881.

Objection is pointed out to said second paragraph, that it does not show that appellee had a dwelling or lived upon the lots upon which the sewage is emptied; in short,

4. that it is not shown that appellee is injured. It is alleged that said sewage emptied into said open ditch renders said lots less desirable for building purposes, that the overflow from said ditch carries the filth and offensive matter upon the plaintiff’s lots, and renders them worthless for garden purposes. There are facts averred in said paragraph from which there could only be drawn the inference that appellee has been damaged in the sum of \$500.

The objection to the third paragraph is that it appears that lot No. 155 was purchased on the day the suit was filed, and the damage, if any, therefore accrued to the

5. previous owner of the lot. By reference to that paragraph it appears that there were several lots or parts

thereof described as damaged. As to which particular one suffered most does not appear.

Appellant's motion for a new trial was overruled, and the evidence is made a part of the record, but the action of the court on said motion is not assigned as error. One of

6. the reasons set out in said motion was that the verdict was not sustained by sufficient evidence. The fact that appellant in this appeal relied upon an alleged error of pleading, fairly warrants the conclusion that upon the merits of the cause appellant's counsel were of the opinion that the cause was fairly tried and a correct conclusion reached.

Judgment affirmed.

SELVAGE ET AL. v. GREEN ET AL.

[No. 6,785. Filed April 1, 1910.]

1. PARTITION.—*Report of Commissioners.—Exceptions.*—Exceptions to the report of commissioners in partition must show that the exceptors were injured by the action of such commissioners, or that the tracts set off to them were not of equal value with the others. p. 644.
2. PARTITION.—*Report of Commissioners.—Verified Exceptions.—Evidence.—Conduct of Commissioners.*—Verified exceptions to the report of commissioners in partition stating that the commissioners consulted with the other parties, but not with the exceptors, and that they failed to value each tract separately, are not sufficient evidence to invalidate the partition made, since there is no showing that the shares of the exceptors were less valuable than those given to the other parties. p. 644.

From Starke Circuit Court; *William A. Foster*, Special Judge.

Suit by Jennie Green and another against Nellie Selvage and others. From a decree for plaintiffs, defendants appeal. *Affirmed.*

H. Miller and H. F. Steis, for appellants.
Burson & Burson, for appellees.

HADLEY, J.—This was a suit brought by appellees against appellants for partition. Partition was ordered, and the commissioners made report, setting off to each of the parties to said suit certain lots and tracts of land representing their interest in the real estate involved. There was no controversy as to the amount of the interest of each. To this report, appellants Nellie Selvage and Jessie Selvage filed objections and exceptions, which were as follows: (1) That said report shows upon its face that said commissioners were biased and prejudiced against defendants herein in the following, to wit, that they gave all that portion of said estate lying in the village of English Lake to plaintiffs and all the river frontage on either side of the Kankakee river to plaintiffs; (2) that said commissioners consulted and talked with plaintiffs, and learned from them their likes and dislikes, but refused to consult said Nellie Selvage or to hear her in said cause; (3) that said commissioners failed properly to appraise the value of the several tracts of land in said estate, and that they simply found the value of the entire estate and then lumped the different tracts to said Nellie Selvage and Jessie Selvage, without regard to the value thereof; (4) that said report is not according to law, as there is no appraisal of the different tracts of land separately and severally made, whereas the statute contemplates that the value of the different tracts or parcels should be so set out that the parties in interest may know upon what to have objections and exceptions; (5) that the report of said commissioners is not sufficient to enable the parties or the court to determine as to the fairness and correctness of the same, such as is contemplated by the statute of the State of Indiana."

These exceptions were overruled by the court, and a decree was entered approving and confirming the report of said commissioners. Said appellants excepted to the ruling of the court on their objections, and assigned said ruling as error.

It will be observed that none of said exceptions in any way averred or showed that said objectors were in any way injured by the action of said commissioners, or that

1. the tract set off to said Nellie Selvage did not correctly represent her proportionate share in value of said real estate.

It is shown by the record that said objections duly verified were the only evidence introduced on the hearing of the case.

This proved nothing. The fact that the commis-

2. sioners gave certain lands to some of the parties, or talked and consulted with appellees, and did not appraise each tract separately, would not necessarily vitiate the partition, if, as a matter of fact, the other parties were not injured thereby. All presumptions are indulged in favor of the correctness and justice of the ruling of the lower court, and substantial injury should be shown to this court to warrant a reversal. The record does not disclose any such condition.

Judgment affirmed.

PETERS v. PETERS.

[No. 7,367. Filed April 6, 1910.]

APPEAL.—*Evidence Not in Record.*—Where the only question raised on the judgment appealed from requires a consideration of the evidence, and the evidence is not in the record, the judgment will be affirmed.

From Superior Court of Marion County (76,858); *Pliny W. Bartholomew*, Judge.

Cross-complaint by Emma Peters against Edward Peters. From a decree for cross-complainant, cross-defendant appeals. *Affirmed.*

S. A. Clinchens, for appellant.

Clifford & Emhardt, for appellee.

Lee v. Lee—45 Ind. App. 645.

COMSTOCK, J.—Motion by appellee to dismiss this appeal, for failure to comply with the rules of this court and other reasons. Without considering the motion, we have read the record and appellant's brief, and find that the only question discussed requires the consideration of the evidence. It affirmatively appears from the record that the judgment and decision was rendered in favor of appellee upon her cross-complaint. No attempt is made to make the evidence upon the issues formed on this pleading a part of the record.

Judgment affirmed.

LEE ET AL. v. LEE.

[No. 7,086. Filed April 7, 1910.]

1. WILLS.—*Codicils*.—*Effect*.—The purpose of a codicil is to enlarge, or restrain, but not to revoke, or supersede, the provisions of a will. p. 647.
2. WILLS.—*Construction*.—*Intention*.—*How Ascertained*.—In construing a will the courts will consider only the language used in the will. pp. 648, 649.
3. WILLS.—*Devise to Devisee and His Heirs*.—*Rule in Shelley's Case*.—A devise to a devisee and his heirs, either mediately or immediately, gives a fee-simple title to such devisee. p. 648.
4. ESTATES.—*Fee-Tail*.—*Statutes*.—Fee-tails are by statute (§3904 Burns 1908, §2958 R. S. 1881), made fee-simple titles. p. 649.
5. WILLS.—*Heirs*.—The term "heirs," as used in a will, is a word of limitation. p. 649.
6. WILLS.—*Codicils*.—*Construction*.—*Estates*.—"Heirs of" Devisee. —A will devising certain real estate to the devisee "in fee simple," followed by a codicil revoking and canceling such devise and giving in lieu thereof the same land "to vest in said [devisee] at [testator's] death for a period of natural life of said [devisee] and at the death of said [devisee] the remainder and the fee simple of said described real estate * * * shall vest in the heirs of" said devisee, gives to such devisee a fee simple title. p. 649.

From Wells Circuit Court; *Charles E. Sturgis*, Judge.

Suit by John W. Lee against Archie W. Lee and others.
From a decree for plaintiff, defendants appeal. *Affirmed*.

Mock & Sons, A. W. Hamilton and William A. Lee, for appellants.

J. B. Merriman and Charles G. Dailey, for appellee.

WATSON, J.—This was a suit brought by appellee against appellants to quiet title to certain real estate in Wells county, Indiana. The complaint alleges that plaintiff is the owner in fee simple of the real estate described therein; that each of the defendants claims an interest therein, which claims are without right and unfounded, and are a cloud upon plaintiff's title thereto.

Appellants Archie W. Lee and Pearl Thatcher filed answer to the complaint, setting out that they are the children of plaintiff by a former wife; that Wayne Lee and Francis Lee are the children of plaintiff by his second wife; that Alexander Lee, father of plaintiff, died testate in Wells county, Indiana, on February 24, 1907; that on May 23, 1904, Alexander Lee made a will, item seven of which is as follows:

"I give and devise to my son, John W. Lee, the following real estate in Wells county, Indiana, to wit: Being the southeast quarter of the southwest quarter of section five, township twenty-five north, range twelve east, containing forty acres more or less, in fee simple."

That afterwards, on December 19, 1906, said Alexander Lee made a codicil to said will, the first item of which is as follows:

"I revoke and cancel the gift and devise in item number seven to my son, John W. Lee, and give, devise and bequeath the following real estate as his interest as noted in item seven of my will; said real estate being described as follows: Being the southeast quarter of the southwest quarter of section five, in township twenty-five north, range twelve east, containing forty acres of land more or less, to vest in said John W. Lee at my death for a period of natural life of said John W. Lee, and at the death of said John W. Lee the remainder and the fee simple of said described real estate in this item shall vest in the heirs of said John W. Lee."

That said John W. Lee has no title to said real estate excepting the title he acquired by virtue of said will and codicil; that by said will John W. Lee was to have a life estate only in said real estate; that Archie W. Lee and Pearl Thatcher are the owners of an undivided one-fourth each of said real estate, and praying that their titles thereto be so declared.

Appellee filed his demurrer to the answer for want of facts, which was sustained by the court, and excepted to by appellants. A decree was entered in favor of appellee, quieting the title to said real estate as against appellants. The only assignment is that the court erred in sustaining the demurrer of appellee to the answer of appellants Archie W. Lee and Pearl Thatcher.

A codicil is a clause added to the will after its execution, the purpose of which is either to alter, enlarge or restrain the provisions thereof. It does not supersede or re-

1. voke the will as an after-made will would do, but it is a part thereof, to be construed with it as one entire instrument.

Appellants insist that the rule as laid down in *Shelley's Case* (1581), 1 Coke *94, should not apply in this case, for the reason that it is manifest by the terms of the will and codicil that it was the intention of the testator that appellee should take a life estate only in the real estate devised.

Judge Sharswood, in the case of *Doebler's Appeal* (1870), 64 Pa. St. 9, 15, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of

the words actually employed. That would be to make a will for him instead of construing that which he has made.”

Courts are not at liberty in the construction of wills to travel outside and seek evidence of the testator’s intention.

They are confined to the will, and cannot speculate

2. upon the intention not therein expressed or plainly implied. The inquiry, therefore, is never what the testator meant to express, but what the words he used do express.

The intention to be carried into effect by a judicial interpretation or construction of a will is not that which existed in the mind of the testator when it was executed, but that which is embodied in the language of the will itself. *Pate v. Bushong* (1903), 161 Ind. 533, 63 L. R. A. 593; *Daugherty v. Rogers* (1889), 119 Ind. 254, 3 L. R. A. 847; *Engelthaler v. Engelthaler* (1902), 196 Ill. 230, 63 N. E. 669.

It is said in 4 Kent’s Comm., *228: “All the modern cases contain one uniform language, and declare that the words, *heirs of the body*, whether in deeds or wills,

3. are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party.”

The rule in *Shelley’s Case*, *supra*, is: “When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase, and the ancestor takes the same in fee or in tail, as the case may be.” *Allen v. Craft* (1887), 109 Ind. 476, 58 Am. Rep. 425; *Perkins v. McConnell* (1894), 136 Ind. 384; *Teal v. Richardson* (1903), 160 Ind. 119; *Lamb v. Medsker* (1905), 35 Ind. App. 662; *Burton v. Car-nahan* (1906), 38 Ind. App. 612.

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By our statutes (§3994 Burns 1908, §2958 R. S. 1881)

“estates tail are abolished; and any estate which,

4. according to the common law, would be adjudged a fee-tail, shall hereafter be adjudged a fee simple.

It will, therefore, be seen that under the rule in

5. *Shelley's Case, supra*, the word “heirs,” as thus used in its legal sense, is a word of limitation.

We do no violence to the well-established rule that in the construction of wills we look to the four corners thereof and the intention of the testator as the main and con-

2. trolling question, for the reason that when the word

“heirs” is used as a word of limitation it expresses the intention of the testator to devise an estate in fee simple.

Allen v. Craft, supra; Teal v. Richardson, supra.

It does not clearly and unequivocally appear in the will that the word “heirs” as here used was not so used in its strict legal sense, but was used as a word of limita-

6. tion. It therefore falls within the rule in *Shelley's Case, supra*, and must be measured by this rule. We

are forced to hold that appellee took said real estate in fee simple.

The trial court did not err in sustaining the demurrer to appellants' answer.

Judgment affirmed.

RALEY v. EVANSVILLE GAS AND ELECTRIC LIGHT COMPANY.

[No. 6,891. Filed February 4, 1910. Rehearing denied April 19, 1910.]

1. PLEADING.—*Complaint.*—*Amendment.*—*Limitation of Actions.*—An amended complaint ordinarily relates to the time of the filing of the original complaint, but this rule does not apply, where it states a new cause of action. p. 654.
2. ACTION.—*Cause of.*—*What Constitutes.*—A cause of action consists of a right of the plaintiff and a breach of such right by the defendant. p. 654.

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3. PLEADING.—*Amended Complaint.*—*New Cause of Action.*—*Tests.*—An amended complaint ordinarily contains a new cause of action, (1) where the new allegations deprive defendant of any defense which he had to the original cause, (2) where the evidence establishing the original, will not establish the new, (3) where the new allegations, if in reply, would have constituted a departure, (4) where the new allegations set up a title not before asserted, and (5) where a judgment on the original complaint would not constitute a bar to the amended complaint. p. 654.
4. MASTER AND SERVANT.—*Electric Light Companies.*—*Failure to Insulate.*—*Amended Complaint.*—*Failure to Turn Off Current.*—*Limitation of Actions.*—Where a servant, in an original complaint, alleged that defendant electric light company negligently failed to insulate its wires, thereby injuring him, his subsequent amendment of such complaint by adding the averment that such company negligently failed to turn off the current from its wires, thereby injuring him, does not introduce a new cause of action against which the statute of limitations would constitute a bar, since the facts alleged in either complaint would bar another action for the same cause. pp. 655, 657.
5. APPEAL.—*Briefs.*—*Presenting Record.*—*Waiver.*—Where appellant questions the answer, he should set it out in his brief, but the appellee's failure to call attention thereto constitutes a waiver, on its part, of the defect. p. 655.
6. APPEAL.—*Briefs.*—*Failure to Comply With Rules.*—*Waiver.*—The question of the failure of appellant to comply with the rules of the Appellate Court in presenting questions in his brief, must be presented at the earliest opportunity; and the filing of a brief on the merits constitutes a waiver of the defect. p. 656.
7. APPEAL.—*Briefs.*—*Rules.*—*Waiver.*—The Appellate Court may, in its discretion, refuse to consider alleged errors not properly presented in the appellant's brief. p. 657.
8. APPEAL.—*Rehearing.*—Questions not presented at the original hearing cannot be presented on rehearing. p. 657.
9. MASTER AND SERVANT.—*Electric Light Company.*—*Failure to Insulate.*—*Complaint.*—A complaint alleging that defendant electric light company negligently failed to insulate its wires, that it knew thereof and the plaintiff lineman did not, and that in performing his work the plaintiff was injured thereby, states a cause of action. p. 658.
10. PLEADING.—*Answer.*—*Partial.*—A paragraph of answer, sufficient as to a part of the complaint, is bad, where it is addressed to the entire complaint. p. 658.

From Gibson Circuit Court; O. M. Welborn, Judge.

Raley v. Evansville Gas, etc., Co.—45 Ind. App. 649.

Action by Jefferson C. Raley against the Evansville Gas and Electric Light Company. From a judgment for defendant, plaintiff appeals. *Reversed*. (For opinion on motion to dismiss, see 43 Ind. App. 57.)

Logsdon & Veneman, for appellant.

E. E. Stevenson, John B. Elam, James W. Fesler, Harvey J. Elam and DeBruler, Welman & DeBruler, for appellee.

COMSTOCK, J.—This action was originally brought on February 14, 1903, in the Superior Court of Vanderburgh County, by appellant against appellee for personal injuries. Upon change of venue the case was tried in the Gibson Circuit Court, resulting in a judgment in favor of appellant. From this judgment the appellee herein appealed to the Appellate Court, where the judgment was reversed (*Evansville Gas, etc., Co. v. Raley* [1906], 38 Ind. App. 342). On January 10, 1907, appellant herein filed his amended complaint in the court below. A demurrer for want of facts to the same was overruled, and appellee filed its answer thereto in three paragraphs; the second and third setting up the statute of limitations. Appellant's demurrer was sustained to the second and overruled as to said third paragraph, and refusing to plead further, judgment was given against him.

The only question sought to be raised upon this appeal is the action of the court in overruling appellant's demurrer to said third paragraph of answer. Said answer sets out a copy of the original complaint, which is, in substance, as follows: That on August 22, 1902, and prior thereto, defendant corporation maintained an electric light and power plant in the city of Evansville, and controlled certain lines of wires suspended upon poles in the streets. These wires were used for furnishing light and power in said city, and for that purpose powerful currents of electricity, dangerous to human life, were passed through them. It is averred that defendant knew, when these wires were strung on the poles, that it would be necessary for its linemen to work in and

about the care and repair of said wires and poles, and that it was the duty of defendant to keep the wires safely and completely insulated, so that linemen, lawfully about them, should not be injured by contact therewith, but that defendant disregarded its duty, and negligently maintained said wires, and negligently failed to protect and cover said wires with safe and sufficient insulating material, and negligently permitted the covering used thereon to become defective and insufficient to render them safe to persons coming in contact therewith, all of which was unknown to plaintiff prior to his injury. It is further alleged that plaintiff was working as an employe of the defendant as a lineman, on the date mentioned, under the direction of a superior officer of defendant, and was directed by said officer to ascend a certain pole, at the intersection of two streets in said city, for the purpose of untying the wires from a glass insulator, preparatory to transferring them to a new pole, to be erected in the place of the old one; that defendant had negligently permitted the old pole to become defective, doty and rotten, to such an extent that it was dangerous for the linemen to climb or stand on it, all of which was unknown to the plaintiff; that defendant, long prior to the date mentioned, knew, or, by the exercise of proper diligence, should have known, that the electric light wires were insufficiently insulated, and that the pole was defective, doty, rotten and dangerous; that plaintiff ascended the pole in obedience to the order given, and while supporting himself thereon in the usual way, by sinking his climbing-spurs into the body of the pole, and while engaged in the act of carrying out his instructions, one of his spurs, by reason of the defective, doty, rotten and dangerous condition of said pole, broke and slipped from its hold, causing plaintiff involuntarily to reach out in an effort to support himself from falling, and to touch and come in contact with said wires, highly charged with electricity, as aforesaid, and by reason and on account of the defective and imperfect insulation thereof, as afore-

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said, he received a current of electricity into his body, whereby he was greatly shocked, wounded, etc.

After setting out the original complaint, said answer continues: "And defendant says that the cause of action described and set forth in plaintiff's amended complaint herein is entirely and wholly different from the cause of action described in the foregoing original complaint, * * * and that the cause of action set forth in said amended complaint * * * did not accrue to the plaintiff within two years next before the filing of said amended complaint."

In the amended complaint allegations as to the defective condition of the pole are omitted, and there, for the first time, it is charged "that on or about August —, 1902, plaintiff entered into a contract of employment as lineman for the defendant, by and through the general superintendent of defendant; that by the terms of said contract of employment it was fully agreed and understood that plaintiff, in the discharge of his duties under said employment, at no time, would be required to handle or work with wires while the same were charged with a heavy or dangerous current of electricity; and that at any time when plaintiff would be required to handle or work with such wires of defendant, as were usually charged with a heavy or dangerous current of electricity, the current of electricity would be turned off by defendant while such work was being performed and until the same was completed; that plaintiff at that time, and at the time of the injuries hereinafter complained of, was wholly inexperienced in working with or handling wires while charged with a heavy or dangerous current of electricity, but relying wholly upon the representations and agreements of the defendant, as aforesaid, entered upon the discharge of his duties under said employment, and continued in such employment until August 22, 1902; * * * that at said time, and at the time of the happening of the injuries hereinafter mentioned, said defendant, in viola-

tion of the terms of said contract of employment, had wholly omitted, neglected and failed to turn off the powerful and dangerous current of electricity then passing through said wires, which fact was, at and prior to said time, to this plaintiff wholly unknown.”

Outside of the omission before stated, and the foregoing additional averments set out in the amended complaint, it and the original contain substantially the same allegations.

“Generally speaking, an amendment to a complaint has relation to the time the complaint was filed, but this never occurs when such amendment sets up a title not pre-

1. viously asserted, and which involves the question of the statute of limitations.” *Lagow v. Neilson* (1858), 10 Ind. 183, 185. See, also, *Blake v. Minkner* (1894), 136 Ind. 418, 422. If the amended complaint states a cause of action different from that in the original complaint, the judgment must be affirmed.

A cause of action may be said to be composed of

2. the right of plaintiff and the obligation, duty or wrong of defendant. *Anderson's Law Dict.*

The matter is tersely stated in the case of *Reeder v. Sayre* (1877), 70 N. Y. 180, 26 Am. Rep. 567, as follows: “The real limitation to it seems to be that the amendment shall not bring in a new cause of action.”

The following tests have been applied: It has been held that an amended complaint sets up a new cause of action (1)

where the new allegation deprives the defendant of

3. any defense he had to the original action; (2) where the evidence that would have proved the original complaint will not prove the new; (3) where the new allegations, if in reply, would have amounted to a departure; (4) where the amended complaint sets up a title not before asserted; and (5) where a judgment on the first complaint would be no bar to a judgment on the second or amended complaint.

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Applying these tests to the averments of the answer before us, whichever conclusion might be reached would be supported by respectable authorities. The cause of

4. action set out in the original complaint was the injury of appellant by the wrongful act or omission of appellee, to wit, the failure properly to insulate its wires. The amended complaint is between the same parties, relates to the same general transaction, the same place, charges the same injury to appellant, and the same neglect properly to insulate its wires. There is added to the charge of failure to insulate an affirmative act of negligence. Such additional charge is not the introduction of a new cause of action. *Cleveland, etc., R. Co. v. Bergschicker* (1904), 162 Ind. 108; *Central, etc., R. Co. v. Foshee* (1899), 125 Ala. 199, 27 South. 1006. It is an additional charge of negligence. The facts alleged in either complaint would bar another action for the same cause. This is sufficient. *Jeffersonville, etc., R. Co. v. Hendricks* (1872), 41 Ind. 48; *Terre Haute, etc., R. Co. v. Zehner* (1906), 166 Ind. 149; *Indianapolis St. R. Co. v. Fearnought* (1907), 40 Ind. App. 333, and cases cited; *Mitchelltree School Tp. v. Carnahan* (1908), 42 Ind. App. 473. It follows that the court erred in overruling appellant's demurrer to the third paragraph of answer.

Judgment reversed, with instructions to sustain appellant's demurrer to said answer and for further proceedings in accordance with this opinion.

ON PETITION FOR REHEARING.

RABB, J.—Appellee, in its petition for rehearing in this case, earnestly insists that it should be granted: (1) Because the court could not properly consider and de-

5. cide any question in the case raised by appellant's assignment of errors, for the reason that appellant's brief failed to comply with the provisions of clause five of

rule twenty-two of the rules of this court, and (2) that the decision of the court upon the question presented is erroneous. The rule of this court referred to requires appellant in his brief to set forth a concise statement of so much of the record as fully presents the error relied upon for reversal.

The transcript in this case is very brief. The only question involved in the appeal is the sufficiency of the third paragraph of appellee's answer, and fully to present this question appellant should have set out in his brief the original complaint and the paragraph of answer to which the demurrer was addressed. This, he did not do, but referred to the transcript by page and line where it might be found, and then proceeded properly to state the points and authorities relied upon for reversal, and his argument to support it. Appellee filed its answer brief, in which it took up the questions presented by the assignment of errors, the points, authorities and argument of appellant, and discussed them on their merits, without in any manner making the point that the questions raised and discussed by appellant's assignment of errors and his argument were not properly before the court for decision, on account of appellant's failure to comply with any rule of the court. Long afterwards, appellee filed a motion to dismiss this appeal, for the reason that no question was presented by the record on account of the failure of appellant to comply with the rule of this court referred to. This motion was overruled, for the reason that it came too late. *Raley v. Evansville Gas, etc., Co.* (1909), 43 Ind. App. 57. We then held that the right to insist on the dismissal of an appeal on this ground was waived by appellee's filing an answer brief on the merits, and we now hold that an objection to the consideration of questions raised by the assignment, on

6. the ground that appellant's brief does not comply with the rules of this court, to be available, must be presented at the first opportunity, and that all such objections are waived by filing an answer brief on the merits.

The court may, in its own discretion, refuse to consider the questions that are not properly presented in appellant's brief, even though no objection to their consid-

7. eration has been made by appellee on this ground:

but so far as the right of the appellee to insist that they shall not be considered, it is waived by failure to make it at the proper time. The same rule of the court to which appellee appeals expressly provides that "no alleged

8. error or point not contained in the statement of points, shall be raised afterwards * * * on petition for rehearing," and it has been held repeatedly by this court that questions not raised in the original brief presented by the parties, either appellant or appellee, will not be considered when raised for the first time on a petition for rehearing. *Underwood v. Sample* (1880), 70 Ind. 446; *Porter v. Choen* (1878), 60 Ind. 338; *Armstrong v. Hufty* (1901), 156 Ind. 606; *Haas v. City of Evansville* (1898), 20 Ind. App. 482.

Appellee insists that the court is in error in holding that the amendment to the original complaint as shown in the opinion did not introduce into the case a new cause

4. of action, which was barred by the statute, and that the facts stated in the original complaint are insufficient to make out a case for appellant, as decided by this court on the former appeal (*Evansville Gas, etc., Co. v. Raley* [1906], 38 Ind. App. 342).

With reference to this last point, it is sufficient to say that the case when before this court on the former appeal was decided upon the evidence, not the pleadings, and it was then held that the evidence did not sustain the allegations of the complaint, and not that the allegations of the complaint were insufficient to state a cause of action.

It was charged in the original complaint, and is charged in the amended complaint now before us, to which appellee's third paragraph of answer is addressed, that appellee knew

and appellant did not know of the defective condition of the insulation of its wires, and of the rotten and doty condition of its poles, when it sent appellant, its servant, upon the rotten and doty pole to work among the defectively insulated electric wires, over which was passing a dangerous and deadly current of electricity. The court said, in passing upon the evidence: "Neither the employer nor employe knew the condition of the poles or wires." If the employer had known of the condition of the poles and wires, and the employe did not know of their condition, as averred in the complaint, and they were in the defective condition as therein alleged, and the employe was sent by the employer to work among the wires, under such circumstances, a different question would have presented itself.

There can be no serious question but that the complaint, to which appellee's third paragraph of answer is addressed,

does state a good cause of action against appellee, re-

9. gardless of all the new averments brought into the complaint by amendment, and without aid from them, and that appellant, if he proved all the facts originally averred, would be entitled to recover, though there was an entire failure on his part to prove any fact brought into the complaint by the amendment; and if it were conceded that appellee is right in its contention that, where a new act of negligence is brought into a complaint to recover damages resulting from negligence charged against a defendant, the statute of limitations will apply to the new act of negligence as of the date on which it was brought into the complaint by way of amendment; and if it were also conceded that the facts brought into the complaint in this case by way of amendment did state a new and independent act of negligence, an action for which was barred by the statute of limitations, still appellee's answer was bad. It undertook to answer the entire complaint, and was clearly bad

10. as to those averments of the complaint which charged appellee with negligence in failing properly to in-

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sulate its wires, and in sending appellant to work among such defectively insulated wires without notice. It is well settled by repeated decisions of the Supreme Court and of this court that an answer that purports to answer the entire complaint, and answers only a part, is bad. 2 Burns' Digest, 1729, and cases there cited on this subject.

Therefore, in any view that may be taken of this question, the action of the court in overruling appellant's demurrer to this paragraph of answer, was error.

Appellant's petition for rehearing overruled.

A. J. YAWGER COMPANY v. BUTTZ ET AL.

[No. 7,050. Filed April 19, 1910.]

APPEAL.—*Weighting Evidence.—Contracts.—Core Drilling.*—Where the defendant company hired the plaintiff to do certain core drilling at certain prices, and there was some evidence that, under defendant's direction, and without defendant's objection, he performed the work, defendant cannot escape payment therefor on the ground that the method of doing the work was somewhat changed.

From Superior Court of Marion County (75,221); *Vinson Carter*, Judge.

Action by Frank C. Buttz against the A. J. Yawger Company and another. From a judgment for plaintiff, defendant company appeals. *Affirmed.*

Barrett & Barrett and *Lew Wallace*, for appellant.

Henry N. Spaan, for appellee Frank C. Buttz.

COMSTOCK, J.—The complaint was originally against the A. J. Yawger Company and appellee Adrian J. Yawger. The demurrer of Adrian J. Yawger to the complaint was sustained, and appellant's motion to strike out certain parts thereof, relating to a mechanic's lien, was sustained. Omitting the parts stricken out, the complaint alleges the execution of a written contract, as follows:

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“Indianapolis, Indiana, September 5, 1907.

This memorandum of agreement, bearing this date, by and between Frank C. Buttz, of Indianapolis, Indiana, and the A. J. Yawger Company, of the same city, to do core drilling immediately east of Eagle Creek at the following prices:

2-inch holes.....\$1.25 per ft.

4-inch holes..... 1.50 per ft.

It is agreed by both parties that we have the right to order Frank C. Buttz to cease drilling at any time after he has drilled five two-inch holes or more thirty feet deep, and with the further exception that if he drills more than twenty two-inch holes, he is to make the price \$1 per foot.

A. J. Yawger Company,
by A. J. Yawger, President.
Frank C. Buttz.”

It is further alleged that immediately after said contract was executed plaintiff entered upon the performance thereof, and erected and put in proper position upon the described premises the boilers, engines, shafting, beams, derricks, ropes and drills, and all other structures necessary for the drilling of the holes contemplated by the contract: and plaintiff drilled and furnished the necessary labor and material for drilling said holes as follows:

20 holes at aggregate depth of 464½ feet at \$1.25	
per ft.....	\$580.62
8 holes at aggregate depth of 115 feet at \$1	
per ft.....	115.00
Total	\$695.62

That all of the labor and materials before mentioned, and comprised in said items, were used in drilling the test holes before mentioned, and which were completed about September 19, 1907; that on and about September 23, 1907, defendant, A. J. Yawger Company, became the owner of the real estate described, by receiving a warranty deed from Elizabeth H. Miller, and said A. J. Yawger Company is still the owner of said real estate; that the sum now due to the

plaintiff on the contract before mentioned is \$695.62, which amount is wholly unpaid.

Appellant answered by general denial. The action was tried without a jury, resulting in a finding and judgment in favor of plaintiff for \$686.87.

The only error assigned is the overruling of appellant's motion for a new trial. Of the reasons assigned in the motion for a new trial the following are relied upon for reversal: (1) The decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law; (5) the assessment of the amount of the recovery is erroneous, being too large; (7) the court erred in holding that upon the complaint in this action and the contract sued on the plaintiff might recover the price specified in said contract for more than the first five wells and the additional drilling done on wells No. 7 and No. 17, for the reason that all other drilling, amounting to about 403.4 feet, was not core drilling within the ordinary and true meaning of said term, or within the meaning of said term as used in the art of drilling, or within the intention or purpose of the parties at the time of the execution of said contract.

There is evidence that there were in all twenty-eight holes drilled. For the first twenty, \$1.25 a foot was charged; for the last eight, \$1 a foot. The object of the drilling was to penetrate the strata of gravel, and find how far below the surface it was, and the quality and depth thereof.

Core drilling can be done by machinery or by hand. It produces the core. A witness testified as follows: "You make a hole in the ground, and take it out, and that produces the core. Your pipe produces the core. The material in the pipe is the core. It can be cut out of the pipe while the pipe is in the ground, or you can take up the pipe and knock it out. One way of making a test for gravel is to draw the sand and gravel out of the pipe while it is in the ground. Another way is to pull the pipe up and knock it

out. Either way is the right way." The method used is a question of convenience. An expert testified, in behalf of appellant, that if a pipe is run down to the depth of from twenty to twenty-seven feet, without having the material drawn up until the pipe is cleaned out, it is not core drilling, unless the entire quantity of material in the pipe is drawn out as a whole, without losing any of it. This witness also testified that in testing for gravel one can tell by the driving itself whether the drill is in dirt or gravel. This witness never sank a well, nor did this kind of work. If the pipe is drawn up and the gravel knocked out of it, the drillers can tell the quality of the gravel. The first hole was drilled, the pipe drawn up and the core knocked out on the ground. The core was cut out of the second hole and thrown into a tub. The third was drilled and the core knocked out on the ground. The fourth core was placed in a tub. Hole number five was dug in the same way and the core tested. By this method the kind of gravel in the bed beneath could be determined. After the first five holes were made, the drilling was changed to hand drilling. All the work was done under the direction of appellant's foreman. No fault was found at the time the drilling was done, and not until the bill was presented after the work had been completed. No objection was made that the drilling was not core drilling. There was evidence to warrant the conclusion of the court that the drilling done was core drilling.

It is claimed by appellant that all but the first five holes were drilled by hand, and that these were on a new contract. This was but a change in the means of the execution of the contract. The change in method was for the purpose of facilitating the work. Appellant desired the work done more rapidly. There is no dispute as to amount of work done or as to the price. It is insisted that appellee could not recover for hand drilling. The court found that the drilling was core drilling, and there was evidence to sus-

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tain said finding. The purpose of the drilling was accomplished, and appellant acted upon the conditions disclosed thereby.

Judgment affirmed.

UNDERWOOD ET AL. v. DECKARD.

[No. 6,993. Filed April 19, 1910.]

APPEAL.—*Weighing Evidence.—Breach of Warranty.—Waiver.—Vendor and Purchaser.*—Whether a purchaser waived his right of action against his vendor for a breach of warranty by assisting such vendor to become guardian of his children and, through such guardian, receiving an ineffective conveyance of their shares, is a question for the trial court, whose judgment upon the weight of the evidence is conclusive on appeal.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by James M. Deckard against LaFayette Underwood and another. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Brooks & Brooks and *Rufus H. East*, for appellants.

Duncan & Batman and *Miers & Corr*, for appellee.

ROBY, J.—This is an action by appellee to recover damages for a breach of warranty. In 1892 appellants executed their warranty deed to appellee for ninety-four and eighty-five one-hundredths acres of land. After the conveyance it was discovered that appellants' four children were the owners of four-fifths of the land. In order to perfect title, the purchase price having been fully paid, LaFayette Underwood was appointed guardian for the children, and proceedings were had designed to transfer the interest of said children to appellee. These proceedings were subsequently decided to have been ineffective and said interest was recovered by said children. *Underwood v. Deckard* (1904), 34 Ind. App. 198.

In the pending action appellee recovered judgment for the proportionate share of the purchase price of said land.

It was contended that the right to recover on account of such breach was waived at the time of the appointment of the guardian and the institution of the aforesaid proceedings. The finding is against appellants on this controverted fact, and is at this time conclusive.

Various points are made for reversal. They have been examined, and are not regarded as sufficient. There is no good reason for adding to the already voluminous case law of the State by discussing them.

Judgment affirmed.

PETHTEL ET AL. v. PETHTEL ET AL.

[No. 6,900. Filed December 16, 1900. Rehearing denied February 23, 1910. Transfer denied April 19, 1910.]

1. DEEDS.—*Delivery.*—*Jury.*—Delivery is essential to the validity of a deed, and is a question of fact for the jury. p. 667.
2. DEEDS.—*Delivery.*—*Elements.*—The delivery of a deed is largely a question of intention, but it must be manifested by words or acts, or by both. p. 667.
3. DEEDS.—*Delivery.*—*Escrow.*—The delivery of a deed to a third person to be delivered to the grantee, must be wholly unconditional, and must be accompanied by a statement of the nature of such deed and with specific directions that it be delivered absolutely to the grantee, or for his benefit. p. 667.
4. DEEDS.—*Delivery.*—*Evidence.*—Evidence that a grantor signed a deed conditioned upon his retention of the possession of the granted land "as he may see fit during his natural life," that he gave the deed to a third person directing that if the grantor predeceased such third person, he should give such deed to the grantee, that, at such person's request, the grantor placed such deed in the safe of a local merchant, with a direction for the merchant to keep it until the grantor called for it, and that if he did not, some one would, the merchant not knowing what the paper was, and that upon the death of the grantor, such merchant delivered it to the grantee, does not show a valid delivery, and, therefore, the deed passed no title. pp. 668, 670.
5. WITNESSES.—*Credibility.*—*Jury.*—The credibility of a witness is a question for the jury. p. 670.

Pethtel v. Pethtel—45 Ind. App. 664.

6. EVIDENCE.—*Declarations of Grantor.—Intentions.—Deeds.—Delivery.—Husband and Wife.*—In a suit involving the delivery of a deed signed by a husband, purporting to convey all of such husband's land to certain of his children, declarations of such husband, prior to his second marriage, that he intended to execute a contract with his intended wife by which he should retain all of his property, and she should retain hers, is not competent, where no such contract was ever executed. p. 670.
7. EVIDENCE.—*Delivery of Deed.—Declarations of Grantor.*—In a suit involving the delivery of a deed, evidence that the grantor took the deed to one of the grantees and had him read it to the grantor, and that such grantee notified the other grantees thereof, is inadmissible. p. 671.
8. EVIDENCE.—*Declarations of Third Persons.—Deeds.—Delivery.*—Declarations of a third person as to the execution of a deed are inadmissible in an action contesting the delivery of such deed, p. 671.
9. EVIDENCE.—*Objections.—Specificness.—Exceptions.*—On the overruling of an objection to evidence, an exception must be reserved; and objections that the questioned testimony is immaterial, or incompetent, or that the question asked was suggestive, present no questions. p. 671.
10. TRIAL.—*Verdict.—Deeds.—Delivery.*—A general verdict against appellants who were contending that the deed in controversy was delivered, is a finding that it was not. p. 671.
11. APPEAL.—*Briefs.—Waiver.—Instructions.*—Instructions not set out in appellants' brief will not be considered. p. 672.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Suit by Sarah J. Pethtel and another against William T. Pethtel and others. From a decree for plaintiff and certain defendants, William T. Pethtel and others appeal. *Affirmed.*

William L. Slinkard, for appellants.

W. V. Moffett, Cyrus E. Davis and Buff & Stratton, for appellees.

COMSTOCK, J.—Sarah J. Pethtel, a childless second wife, and Mary East, a daughter by a former marriage, of William Pethtel, deceased, instituted this proceeding for the partition of certain real estate. The complaint is in the usual

form for partition, and made defendants all the children and grandchildren of said William Pethtel, alleging that the widow had a one-third interest for life in the whole of said real estate; that the other plaintiff, Mary East, and the defendants to the complaint were the owners in fee simple therein as tenants in common, and asking for partition, etc.

On December 3, 1904, certain of the defendants, severing from their codefendants, filed their cross-complaint against plaintiffs and against all other codefendants, setting out that Sarah J. Pethtel is a widow, and that all other cross-defendants were children and grandchildren of William Pethtel, deceased, and that they are the owners of the real estate in the same proportion as alleged in the complaint; that William Pethtel died seized of the lands described; that certain codefendants (appellants) have a deed for said real estate made in the lifetime of William Pethtel; that the deed never was delivered to them; that they (appellants) wrongfully placed the deed of record in the recorder's office in Greene county, Indiana (setting out a copy of the deed), and alleging that the procuring and placing of said deed of record has cast a cloud on the title of the real estate; that the cross-complainants are the absolute owners; that said deed was void and should be canceled, and praying that said deed be set aside and partition made, etc.

On February 13, 1905, appellants filed their cross-complaint against plaintiffs and their codefendants, alleging that they are the owners in fee simple of the land described in the complaint, and also described in their cross-complaint, and that they are the owners in fee simple of all of said real estate; that plaintiffs and their said codefendants claim an interest in said real estate, which interest is without right and unfounded, and a cloud upon their title, and asking that the title be quieted in them as against all of the plaintiffs and codefendants.

Issues were formed upon both the complaint and the cross-complaints by answers in general denial. Two trials were

had. The first was by the court, and a new trial was taken as of right; the second was by a jury, resulting in a general finding for plaintiffs and cross-defendants, Barbara Hudson and others, and against the cross-complainants (appellants) on their cross-complaint. Appellants' motion for a new trial was overruled, and the court appointed commissioners to make a report. To their report, appellants filed objections, which were overruled and exceptions taken. Appellants' motion for a new trial, on the objections to the commissioners' report, was overruled.

The controlling question is whether there was a delivery of the deed.

Do the facts show a delivery of the deed? Without delivery the deed passed no title to the grantees. The question of delivery is one of fact to be determined on the

1. evidence. *Vaughan v. Godman* (1884), 94 Ind. 191, 194; *Fireman's Fund Ins. Co. v. Dunn* (1899), 22 Ind. App. 332; *Fifer v. Rachels* (1906), 37 Ind. App. 275. "It is much a question for the jury in each particular case." *Dearmond v. Dearmond* (1858), 10 Ind. 191, 195. The intention of the grantor is the controlling element
2. constituting delivery, and while no formality need be observed, the intention may be manifested by words or acts or both; but one or the other must be present to make a good delivery.

The Supreme Court and this court have been called upon in a number of cases to decide whether a deed has been delivered. In the case of *Osborne v. Eslinger* (1900),

3. 155 Ind. 351, 80 Am. St. 240, a few of them, with alleged circumstances of the supposed delivery, are collected, with citations from approved textbooks. In the course of the opinion the following rule is stated: "Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee,

to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and authority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee.

“If the deed is placed in the hands of a third person, as the agent, servant, friend, or bailee of the grantor, for safe-keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land, then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution.” See, also *Fifer v. Rachels* (1901), 27 Ind. App. 654; *Stout v. Stout* (1902), 28 Ind. App. 502.

The evidence shows that in 1892, William Pethtel, the grantor in the deed in question, then a widower and the father of the codefendants had a notary public draw

4. up a general warranty deed to appellants for the 180 acres of land in question. The deed contained the following provision:

“It is understood that, as a condition of this deed, the grantor is to have and hold possession of the premises and occupy and control and manage the same as he may see fit during his natural life.”

One Meredith and the grantor had several times been talking about putting their "property in some shape" while they were living, and on September 1, 1892, the grantor handed the deed in question, enclosed in an envelope, to Meredith, an intimate friend, saying: "Old chum, there is them papers. And now I want you to take care of them, and if I die before you, you give them to my Tom [meaning William T.]."

Meredith, after reading the first part and seeing to whom the deed was made, put it in the envelope and sealed it. At the time the deed was handed to him, Meredith was a widower. The deed remained in his possession until 1896, when Meredith had remarried, and, not getting along well with his wife, he told Pethtel that he was having trouble with his wife, and that he was uneasy about the deed, and advised him to put the deed in "Dick's" safe, meaning Richard W. Yoho, a merchant at Cincinnati, Indiana. When the grantor reached Yoho's store, Yoho and his son Clyde were present. The son testified: "Well, he gave Father an official sized envelope, and requested him to put it in the safe for safe-keeping, and he requested also that Father keep that; that he might never call for it, but if not, someone would." The father testified: "I was in my store and Mr. Pethtel handed me a package of papers and said: 'Dick, I want you to put this in the safe and take care of it.' He came right around to the safe. I was behind the counter like—behind the safe, and he came up to the corner of the safe. * * * I opened the safe and put it in. After I had opened the safe, Mr. Pethtel said: 'I may never call for this, but if I don't, some person will'—or 'somebody will—some person,' I believe was the remark."

Meredith survived the grantor, who never called for the deed. The deed remained with Yoho until the day after the death of the grantor, when it was handed by him to William T. Pethtel, who had it recorded in the proper records in the recorder's office.

In answer to the question of appellee Sarah J. Pethtel, shortly before the death of the grantor, concerning the deed, Meredith said that he "did not know anything about any deed." After the grantor's death he told about having had the deed, and explained his denial of any knowledge of the deed, by stating that when the envelope was delivered to him Pethtel told him not to tell any of his children about it.

There is no uncontradicted evidence, beyond the manual delivery to Meredith, that such deed was intended to be delivered to the grantees. Meredith testified that he read part of the deed giving the names of the grantees, but he admits

he denied having any knowledge of the deed. He ex-

5. plains this, but it was for the jury to pass upon the credibility of his evidence. The only evidence that Meredith had any knowledge of the grantee or from which knowledge could be inferred was that he was directed to give the papers to the son Tom.

When the deed was delivered to Yoho, the language accompanying the delivery clearly indicated that the papers were deposited there for safe-keeping, and subject to

4. the call of the grantor. This would not constitute a delivery. The action of the grantor and of Meredith tended to show that the grantor and Meredith intended that the deed should be subject to the control of the grantor, and that he had not parted with dominion over it. While if the placing of the deed in the first instance with Meredith was a delivery of the deed which the retaking and depositing with Yoho would not annul, yet it was a circumstance in determining the question of intent that the jury had the right to take into account in arriving at a verdict.

It is insisted by appellants that competent testimony offered by them as follows was erroneously excluded. They offered to prove by witness Jacob Neal that William

6. Pethtel before his marriage told the witness that he and his intended wife were going to come to Bloom-

field and make a marriage contract, by which each was to retain his or her own property for his or her own children.

It is argued that in view of the fact that the widow was claiming one-third interest for life in the real estate, this evidence was competent to show that she should have had no interest in this controversy. As it is admitted that no such contract had ever been found, and so far as the evidence shows no such contract was ever entered into, we think there was no error committed.

Appellants offered to prove by witness William T. Pethtel that the same day this deed was made his father

7. brought it to him and had him read it over to him, and that he notified the other grantees in the deed.

This evidence was properly excluded.

Jacob Floyd testified that he told William T. Pethtel about the deed. The court struck out this testimony. In this there was no error. Floyd was also asked what

8. the grantor said to him about making the deed, and why he was going to make it. This evidence was admitted.

The court permitted the witnesses John R. Combs, Andy Combs and John Wilbur to tell about a conversation had with the grantor in 1896 or 1897, about making the

9. deed. As to the testimony of Wilbur no exception was reserved. As to the others, the objections made are that the testimony is immaterial, that the question was suggestive and incompetent. These objections present no question.

Upon the first trial a special finding of facts was made. They are not brought here upon this appeal, so that the particular grounds upon which the judgment of the court

10. was based is not shown. Upon the second trial, the general verdict found for plaintiffs upon all the issues and against the cross-complainants. It is therefore a finding against the delivery of the deed. All other questions are subsidiary to this one controlling question.

We have considered the question arising on the evidence, argued. The instructions are neither set out nor argued in appellant's brief, nor is the substance thereof set out.

11. Upon the whole record we find no reversible error.

The same conclusion having been reached in two trials and before different tribunals, supports the proposition that the verdict is fairly sustained by the evidence.

Judgment affirmed.

KLEIN v. NINDE.

[No. 6,762. Filed April 20, 1910.]

1. **CONTRACTS.—Sales.—Fraud.—Special Findings.**—Special findings that defendant falsely represented to the plaintiff that a certain Persian lamb fur jacket was manufactured from first-class skins, when, in fact, it was made from damaged skins, that the plaintiff was induced by such false representation to pay for the jacket, and that "defendant was guilty of fraud in making said sale," sufficiently show that the contract was fraudulent as against the plaintiff. p. 673.
2. **APPEAL.—Weighing Evidence.**—The Appellate Court will not weigh conflicting evidence. p. 673.
3. **APPEAL.—Affirmance.—Evidence.**—A decision supported upon each essential fact by some evidence will be affirmed on appeal p. 674.

From Adams Circuit Court; *Richard K. Erwin*, Judge.

Action by Daniel B. Ninde against Richard Klein. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Peterson & Moran and *Hanna & Geake*, for appellant.

Lee J. Ninde and *A. P. Beatty*, for appellee.

MYERS, C. J.—This action was commenced before a justice of the peace. From the justice an appeal was taken to the Allen Circuit Court, and from that court the venue was changed to the court below.

Appellee purchased from appellant, a fur dealer, one Persian lamb fur jacket, for which he paid appellant an

agreed price. It was claimed by appellee that appellant fraudulently represented the quality of the material of which the garment was made, and that, upon a brief use, the jacket was found to be made in part of damaged skins. Whereupon appellee immediately returned it to appellant, and left it in his possession, where it still remains, and demanded the return of the purchase price, which appellant refused.

Upon request the trial court made a special finding of facts and stated conclusions of law thereon.

Appellant's motion for a new trial was overruled, and this ruling and that the court erred in its conclusions of law are the errors assigned.

A rescission of the contract, on the ground of fraud, was a question presented by the issues, and it is insisted by appellant that fraud was not found as a fact. The

1. court found "that defendant was guilty of fraud in making said sale to plaintiff, and in making said contract with plaintiff, and that plaintiff was induced by said fraudulent representations to enter into said contract and to pay his money as aforesaid." Other findings show material representations made by appellant to appellee as an inducement for the latter to purchase the jacket; that such representations were relied on by appellee, and that they were fraudulently and falsely made. The findings are against appellant's contention.

The only other point relied on by appellant is

2. that the findings were not supported by sufficient evidence.

We have carefully read the evidence as presented to us by the record, and, without taking the space to set out a synopsis of it in this opinion, it is sufficient to say that it was all oral, and, in most part, exceedingly conflicting. It is not for this court to settle conflicting testimony. *Seiberling & Co. v. Porter* (1905), 165 Ind. 7. Nor will this court disturb the decision of the trial court because of insufficient

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evidence, unless the evidence most favorable to appellee, including all legitimate and reasonable inferences which can be deduced therefrom, leaves unsupported an essential fact to sustain the decision of the court or verdict of the jury. *Heath v. Sheetz* (1905), 164 Ind. 665.

The evidence is amply sufficient to sustain the decision of the court. Judgment affirmed.

THE STATE OF INDIANA, EX REL. ROE ET AL., v.
DUDLEY ET AL.

[No. 7,046. Filed April 21, 1910.]

1. INTOXICATING LIQUORS.—*Illegal Sales.—Loss of Support.—Proximate Cause.—Instructions.*—An instruction that before there can be a recovery for loss of support caused by the illegal sale of liquors it must be shown that such sale was the proximate cause of such loss, is erroneous. p. 675.
2. NEW TRIAL.—*Designating Instructions Questioned.*—A motion for a new trial assigning as one reason the giving of certain numbered instructions, and, as another, the giving of certain instructions requested by plaintiff, sufficiently designates the questioned instructions, where two sets of instructions were presented, one by plaintiff, the other by defendants. p. 675.
3. INTOXICATING LIQUORS.—*Illegal Sales.—Loss of Support.—Proximate Cause.—Conflicting Instructions.*—Certain instructions that the alleged illegal sale of liquors must, to warrant a recovery for loss of support, be the proximate cause of such loss, are not cured by others stating that a recovery is warranted, if such sale was the direct or remote result of such loss. p. 676.

From Gibson Circuit Court; *M. W. Fields*, Special Judge.

Action by The State of Indiana, on relation of Anna P. Roe and others, against James A. Dudley and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

Samuel W. Williams, Thomas Duncan, Charles D. Hunt and Gilbert W. Gambill, for appellant.

W. A. Cullop and George W. Shaw, for appellees.

COMSTOCK, J.—Appellant instituted this action under §8355 Burns 1908, §5323 R. S. 1881, on a statutory bond executed by appellees, to recover damages alleged to have been sustained to their means of support through the unlawful sales of intoxicating liquors to Henry M. Roe, husband and father of the relators, and on account of which he lost his life.

The cause was put at issue by general denial. The complaint was first filed in the Sullivan Circuit Court, but, after successive changes of venue, was tried in the court below, resulting in a verdict and judgment in favor of appellees.

This is the second appeal. In the former appeal (*Dudley v. State, ex rel.* [1907], 40 Ind. App. 74) the judgment was reversed, for the reason that a mandatory instruction, which purported to state all the material facts necessary to relators' recovery, omitted a material fact.

The overruling of appellant's motion for a new trial is assigned as error, and under said assignment relators insist that the court erred in giving to the jury certain instructions hereinafter referred to.

Instructions one, eight, nine and ten, given to the jury at the request of defendants, were to the effect that before plaintiff could recover it must appear by a preponder-

1. ance of the evidence that the illegal sale of liquor to the decedent was the proximate cause of relators' loss of means of support. These instructions were erroneous. *Greener v. Niehaus* (1909), 44 Ind. App. 674; *Homire v. Halfman* (1901), 156 Ind. 470; *McCarty v. State, ex rel.* (1904), 162 Ind. 218; *State, ex rel., v. Terheide* (1906), 166 Ind. 689; *Nelson v. State, ex rel.* (1903), 32 Ind. App. 88.

In appellant's motion for a new trial, reason number six is as follows: "The court erred in giving instructions 1, 2,

4, 6, 7, 8, 9, 10, 11, 13, 15, 21, 22, 28, 29, 30, 31 and

2. 32, and the court erred in giving each one separately of said instructions." Appellees make the point that this is the only assignment that calls in question the action of

the trial court in giving said instructions; that two sets of instructions were presented, each embodying the numbers set out in the motion, one being from one to thirty-six, inclusive, and the other from one to thirty-two, inclusive; that the motion should have been addressed to the instructions requested by defendant, and that for the reasons stated the assignment cannot be considered.

In the motion for a new trial, the fourth and fifth reasons assign the refusal to give certain instructions requested by plaintiffs, among others, one, two and ten, so requested. Assignment number six of said motion avers that the court erred in giving, among others, instructions one, two, eight and ten. The instructions to which the motion was addressed is thus made clear.

In instructions fifteen, twenty-three and thirty, given at the request of plaintiff, the jury was told to find for plaintiff, whether the loss of means of support was the direct or

3. remote result of such intoxication. They are inconsistent with instructions one, eight, nine and ten, given at request of defendants, and were calculated to mislead the jury. *Nickey v. Steuder* (1905), 164 Ind. 189; *Pittsburgh, etc., R. Co. v. Noftsgen* (1897), 148 Ind. 101; *Cleveland, etc., R. Co. v. Snow* (1906), 37 Ind. App. 646; *Somers v. Pumphrey* (1865), 24 Ind. 231; *Summerlot v. Hamilton* (1889), 121 Ind. 87, 91; *State, ex rel., v. Sutton* (1885), 99 Ind. 300, 307; *Kirland v. State* (1873), 43 Ind. 146, 154, 13 Am. Rep. 386.

Objections are urged to other instructions, but we do not deem it necessary to consider them.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

WISEMAN v. GOULDSBERRY.

[No. 6,742. Filed April 22, 1910.]

1. **APPEAL.—***Making Instructions Part of Record.—Statutes.*—Under §561 Burns 1908, Acts 1907, p. 652, providing that the court shall indicate by a signed memorandum which of the instructions were given, and which were refused, instructions not so designated cannot be considered a part of the record. p. 678.
2. **APPEAL.—***Weighing Evidence.*—The Appellate Court cannot weigh conflicting evidence. pp. 678, 679.
3. **WITNESSES.—***Nonexperts.—Insanity.—Weight of Evidence.*—Nonexperts who have observed defendant's actions, may, after stating the facts, give their opinions as to his sanity, the weight of such evidence being for the jury. p. 679.

From Henry Circuit Court; *Ed Jackson*, Judge.

Action by Harley A. Gouldsberry against John W. Wiseman. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Horace G. Yergin, Eugene H. Bundy and N. G. Jones, for appellant.

William O. Barnard and William E. Jeffrey, for appellee.

WATSON, J.—This action was brought by appellee against appellant. The complaint is in one paragraph, setting out, in substance, that appellant is an inhabitant of Henry county, Indiana; that he is a person of unsound mind and incapable of managing his estate. Wherefore, appellee prayed that a guardian be appointed for appellant. To this complaint an answer was filed in general denial.

Trial was had by jury and a verdict rendered declaring appellant a person of unsound mind and incapable of managing his own estate. Motion for a new trial was made, overruled and exception taken.

The error assigned is that the court erred in overruling appellant's motion for a new trial. The reasons set out in the motion for a new trial and relied upon for reversal are: (1) The verdict is not sustained by sufficient evidence; (2)

the verdict is contrary to law; (3) error of law committed upon the trial by the judge in giving to the jury, on his own motion, instruction six; (4) error of law committed upon the trial by the judge in giving to the jury, on his own motion, instruction four.

Section 561 Burns 1908, Acts 1907, p. 652, provides:

“The court shall indicate, before instructing the jury, by a memorandum in writing at the close of the instruc-

1. tions so requested, the numbers of those given and of those refused, and such memorandum shall be signed by the judge. All instructions given by the judge on his own motion shall be in writing when either party has requested that the court instruct the jury in writing in the cause before the commencement of the argument thereof and when given in writing shall be numbered consecutively and signed by the judge.”

It is urged that the trial court did not comply with this act, and upon examination of the record we find that the trial judge did not indicate which instructions were given and which were refused nor were any of the instructions, either those tendered by plaintiff or those given by the judge upon his own motion, signed by the judge. Before the instructions in a cause can be made a part of the record and exceptions saved under the foregoing section, there must be a substantial compliance with all the provisions thereof. *Baker v. Gowland* (1906), 37 Ind. App. 364; *Mace v. Clark* (1908), 42 Ind. App. 506.

Appellee insists that, under the provisions of the foregoing section, the instructions are not in the record. In this contention he is sustained.

Appellant insists that the verdict is contrary to law and contrary to the evidence, for it is wholly wanting in evidence to sustain the allegations. The evidence discloses that

2. appellant was between seventy-seven and eighty years old at the time of the trial; that he was blind; that he had not been able to be away from his place in six years,

except to his wife's funeral, which occurred about two years prior to the trial of this cause. A number of his neighbors testified that he was a person of unsound mind, and incapable of managing his own estate. These witnesses testified to conversations with appellant, and from these conversations, acquaintance and opportunity to observe his conduct, they gave as their opinion that he was a person of unsound mind. On the contrary, other neighbors, of like opportunity, testified that he was a person of sound mind.

A nonexpert witness may give his opinion as to the mental condition of a person, in connection with a statement of facts upon which it is based, provided such facts show him

3. to be acquainted with the person, and to have observed him. From these statements of facts the jury shall determine what weight, if any, shall be given to the testimony of the witness. *Sage v. State* (1883), 91 Ind. 141; *Johnson v. Culver* (1888), 116 Ind. 278; *Stumph v. Miller* (1895), 142 Ind. 442; *Armstrong v. State* (1892), 30 Fla. 170, 11 South. 618, 17 L. R. A. 484.

Under the instructions of the court, this cause was submitted upon the evidence to a jury which found for plaintiff and adjudged defendant to be a person of unsound

2. mind and incapable of managing his own estate. The evidence is contradictory, and, looking to the record, it seems to be unsatisfactory upon the issues joined; but the jury, having returned a verdict upon the evidence, we are not at liberty to disturb it, for to do so we would be required to weigh the evidence, and this we are forbidden to do. The weight of the testimony is for the jury. This is so well settled and so well understood that it is unnecessary to cite authorities. There is evidence from which the jury might reasonably have reached the conclusion it did.

Judgment affirmed.

TRAYLOR, GUARDIAN, v. HOLLIS.

[No. 7,030. Filed April 22, 1910.]

1. TRUSTS.—*Certificates of Deposit.—Trustees.*—A certificate of deposit given by a person to his wife to be delivered, at his death, to the beneficiary, constitutes a trust fund in favor of such beneficiary. p. 682.
2. EVIDENCE.—*Declarations.—Trustees.*—Declarations of a wife as to how she came into possession of, and the purpose for which she holds, a certain certificate of deposit given to her by her husband, to be delivered at his death, to a third person, are admissible in determining the real beneficiary. p. 682.
3. EVIDENCE.—*Declarations of Nominal Purchaser.—Resulting Trusts.*—Declarations of a nominal purchaser, while he holds the title to the lands in controversy, are admissible to establish a resulting trust in favor of third persons. p. 682.
4. EVIDENCE.—*Declarations of Trustee After Expiration of Trust.*—Declarations of a trustee, after parting with the possession of the subject-matter of the trust, are not admissible to show the rightful beneficiary. p. 683.

From Pike Circuit Court; *E. A. Ely*, Judge.

Action by Alexander C. Hollis against Albert H. Traylor, as guardian of James E. Hollis and others. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Bomar Traylor, Sidney B. Hatfield, James A. Hemenway, Frank H. Hatfield and William S. Hatfield, for appellant.

Ely & Greene, for appellee.

RABB, J.—Appellant was on November 1, 1906, duly appointed guardian of James E., John E., and Orville O. Hollis, minors. His wards were the grandchildren of John Traylor, deceased, who was the uncle of appellant. John Traylor was possessed of considerable wealth, and all the property and estate of appellant's wards came through him. By will he devised certain lands to his said wards, and named them, among others, as his residuary legatees, and in his will requested appellant to become their guardian. Said testator died on October 16, 1906. Sometime prior to his death he placed in

the hands of Martha Traylor, his wife, a certain certificate of deposit for \$500, issued in his favor by a bank in Dubois county. This certificate of deposit was so delivered by him to Martha Traylor, in trust, to be delivered by her, after his death, to appellant, but whether it was to be so delivered for the use and benefit of his wards or for his own use and benefit is the controverted question in this case.

After the death of said John Traylor, said Martha Traylor delivered the certificate of deposit in question to appellant, since which time, and before the trial of this cause, she died. Appellant failed to make any inventory or account of the certificate of deposit as guardian of his wards, and this proceeding was brought to remove him from his trust, for failing to return a proper inventory of the property, and to compel him to account for the certificate of deposit.

Issues were formed and a trial was had resulting in a finding and judgment against appellant removing him from his trust as such guardian, and entering judgment against him for the amount due on said certificate of deposit.

Upon the trial of this cause, the court permitted appellee, over the objection and exception of appellant, to prove declarations and statements made by Martha Traylor while she was yet in the possession of the certificate of deposit, and before she had executed her trust by delivering it to appellant, with reference to the manner in which she came into possession of said certificate, and the purpose for which she held it, and over the objection and exception of appellant, on motion of appellee, the court struck out of the evidence proof of certain declarations and statements made by said Martha Traylor with reference to the same subject, after she had executed her said trust by delivering the possession of the certificate to appellant, and the only questions presented upon this appeal involves these rulings of the court upon the admission and rejection of this evidence.

Appellant insists that the statements made by Martha Traylor regarding the certificate of deposit are incompetent,

as being hearsay evidence; that such statements are not binding upon appellant, nor admissible against him, because they were not made in his presence, nor were they made by Martha Traylor in connection with the performance of any act or duty of her agency or trust, and that the transaction, as disclosed by the evidence, was a gift *causa mortis* or nothing, and that if it was a gift *causa mortis* appellant was the donee; if it was not a gift *causa mortis*, then it was not effective as a gift at all. This latter contention cannot be sustained.

It is unquestioned that John Traylor created a trust, the subject-matter of which was the certificate of deposit, the trustee, his wife, Martha Traylor, and whether ap-

1. pellee or appellant was the *cestui que trust* is a matter that is immaterial. The gift would be equally effective either way. If the certificate was to be delivered by Martha Traylor to appellant as guardian of his wards, they, and not appellant, were the *cestuis que trust*. The disputed question is, Who were in fact the *cestuis que trust*? We

think, under the authorities, it is perfectly clear that

2. the declarations of the trustee, made by her with reference to the manner in which she came into possession of the certificate of deposit, and the purpose for which she held it, were entirely competent. It is well settled that declarations and statements made by the nominal pur-

3. chaser of land, while the title still remains in him, are competent to establish a resulting trust in favor of third persons. *Baker v. Leathers* (1852), 3 Ind. 558; *Tilford v. Torrey & Lockwood* (1875), 53 Ala. 120; 13 Ency. Ev., 141, and cases cited.

There is no reason why the same rule should not extend to a trustee in possession of personal property, as ex-

2. planatory of the nature of his possession and of the trust under which he holds the property.

In the case of *Abney v. Kingsland & Co.* (1846), 10 Ala. 355, 44 Am. Dec. 491, it is said: "It has been often held,

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that what a person in the possession of real or personal estate says in respect to the same is admissible as part of the *res gestæ*. And in *McBride v. Thompson* [1845], 8 Ala. 650, we said: * * * 'The affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestæ*, which *res gestæ* is his continuous possession.' " These statements of the supreme court of Alabama have met with the approval of the courts of this State. *Tedrowe v. Esher* (1877), 56 Ind. 443; *Bunnell v. Studebaker* (1882), 88 Ind. 338; *Kuhns v. Gates* (1883), 92 Ind. 66; *McConnell v. Hannah* (1884), 96 Ind. 102; *Burr v. Smith* (1899), 152 Ind. 469; *Tyres v. Kennedy* (1891), 126 Ind. 523; *Gaar, Scott & Co. v. Shaffer* (1894), 139 Ind. 191; *Ronsdel v. Moore* (1899), 153 Ind. 393, 53 L. R. A. 753; *Stanley's Estate v. Pence* (1903), 160 Ind. 636.

It is equally clear, so far as the trustee was concerned, that statements made by her after the trust had been executed, and she had parted with the possession of the

4. subject-matter of the trust, were incompetent.

Phillips v. South Park Commissioners (1887), 119 Ill. 627, 10 N. E. 230, and cases cited; *Tilford v. Torrey & Lockwood, supra*.

No error intervened in the ruling of the court complained of with reference to the admission or the rejection of this evidence. Judgment of the court below affirmed.

BOYER v. INDIANAPOLIS NORTHERN TRACTION COMPANY ET AL.

[No. 6,661. Filed January 14, 1910. Motion to modify mandate overruled April 22, 1910.]

1. TRIAL.—*Verdict*.—*Interrogatories*.—*Conflict*.—A general verdict for the plaintiff constitutes a finding in his favor upon all of the issues, and answers to interrogatories to the jury overturn such verdict only when they are irreconcilable therewith upon any evidence admissible within the issues. p. 686.

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2. TRIAL.—*Interrogatories.—Conflict.*—Conflicting interrogatories nullify one another. p. 687.
3. TRESPASS.—*General Verdict.—Interrogatories.—Reversal.—Mandate.*—Where a complaint alleged, among other acts of trespass, that the defendant authorized the cutting of plaintiff's trees and the destruction of his wheat and fences, to his damage, answers to interrogatories which fail to negative all of such acts will not overturn a general verdict for the plaintiff; and a judgment for the plaintiff may be ordered on a reversal. Rabb, P. J., and Myers, C. J., dissent. p. 687.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Lewis Boyer against Mary E. Essington and another. From a judgment for defendants, plaintiff appeals. *Reversed.*

Neal & Beals, for appellant.

Shirts & Fertig, C. G. Reagan and *W. S. Christian*, for appellees.

COMSTOCK, J.—Appellant brought this action against appellees for damages on account of the alleged trespass of appellees while constructing an interurban railroad through land held and occupied by appellant as a tenant. Issues were formed on the second amended complaint and answers and replies thereto. Said amended complaint is in one paragraph, and alleges, in substance, that appellant was the tenant in possession of a certain tract of real estate owned by appellee Essington, and was engaged in farming said land; that during such tenancy, in disregard of the rights of appellant, appellee Essington sold and conveyed by warranty deed to her coappellee, Indianapolis Northern Traction Company, a strip of land entirely across the farm, to be used and enjoyed by said company as and for a right of way for an interurban railroad; that appellees knew that appellant was in possession of said real estate and resided thereon as such tenant; that it was the intention and purpose of appellees that said company should take absolute and exclusive possession of the ground so conveyed, to the complete exclusion of appellant therefrom, for the purpose of

constructing thereon such railroad; that said company did not acquire, nor attempt to acquire from appellant, the right of way by condemnation or agreement, and no consideration was offered or paid to him for his rights, and appellees knew and intended that such conveyance and occupation would completely dispossess appellant of said strip of ground; that after the conveyance, appellee Essington authorized said company to take full possession of the real estate so conveyed, for the purpose of constructing and operating said railroad, in utter disregard of the rights of appellant as such tenant; that appellees, and particularly appellee company, under and by virtue of said deed, and the authority and permission so given by its coappellee Essington, over the objection and protest of appellant, unlawfully and wrongfully did enter upon said real estate, and commit the acts of trespass set out in the complaint, such acts of trespass injuring appellant; that he was permanently evicted and excluded from the real estate so conveyed, and that it was the intention of appellees that he should be so excluded, and that appellee company did not accept and recognize him as its tenant of said real

Each appellee answered separately, to the same effect: (1) General denial; (2) payment; (3) that before the execution of appellant's lease appellee company had begun negotiations for the right of way, and had staked it out across said lands, and later began an action in the Hamilton Circuit Court to appropriate the real estate which was afterwards conveyed, and that appellant had knowledge of such negotiations at the time he leased, also that appellee company had surveyed and staked out said right of way; that all damages which he would sustain were accounted for, and allowance made therefor in fixing the consideration he was to pay as rental for the farm.

Appellant replied separately by general denial to the second and third paragraphs of each of said answers.

A trial by jury resulted in a general verdict for appellant

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against appellee Essington, assessing his damages at \$300, and a finding for appellee company. With the verdict the jury returned answers to interrogatories.

The separate motion of appellee Essington for judgment in her favor on the answers to interrogatories was sustained, and judgment rendered in her favor on said answers and in favor of appellee company on the general verdict against appellant for costs.

The error relied on for reversal is "that the court erred in sustaining the separate motion of appellee Essington for judgment in her favor on the answers of the jury to special interrogatories, notwithstanding the general verdict."

The general verdict finds for appellant on all the material averments of complaint. "The special findings override the general verdict only when both cannot stand, and this

1. antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered by a jury upon their oath." *Amidon v. Gaff* (1865), 24 Ind. 128, 130. And see *Rhodus v. Johnson* (1900), 24 Ind. App. 401, and cases cited.

The answers to interrogatories show substantially that appellee Essington, on or about January 27, 1903, sold and conveyed by warranty deed to her coappellee, the Indianapolis Northern Traction Company, the tract of real estate described in the complaint. In connection with appellee traction company, appellee Essington went upon and took possession of said real estate so conveyed by her, and plowed and dug it up, and constructed a railroad thereon. The only act she performed in common with said traction company was the removal of timber about May 1, 1903. After said conveyance she did not enter upon said real estate for any other purpose than to cut and remove some

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timber therefrom, and to cross and recross said real estate in going to and from her dwelling-house located upon the real estate so leased to plaintiff. Said traction company first took possession of said real estate about May 1, 1903. Said traction company did not by itself commence the construction of the railroad upon said real estate. The part taken by appellee Essington was to cut and remove timber. She was not in any way assisted by any of the employes or servants of the traction company in so doing. She did not exercise over said real estate, after conveying it, any control, except to take some timber. She did not cut nor throw down any fences upon said real estate, through which any of the stock of appellant could escape, after said traction company took possession thereof. The only act of trespass committed by said Essington was to cut and remove some timber. Plaintiff's tenancy of the real estate described in the complaint began March 1, 1903.

There is apparent conflict in some of the answers to interrogatories, but if real they must be disregarded. Other interrogatories directly support the general verdict.

2. Numerous acts of trespass are charged in the complaint against defendants, and the traction company, apart from the cutting of trees, is specially charged
3. with having, under permission of appellee Essington, thrown down fences, destroyed fields of growing wheat, and committed other acts of trespass from which plaintiff suffered loss. The issues upon these allegations are decided by the general verdict in favor of appellant, and under the rule there is no irreconcilable conflict between the facts specially found and the general verdict.

Judgment reversed, with instructions to render judgment on the general verdict.

All concur in the reversal, but Rabb, P. J., and Myers, C. J., are of the opinion that a new trial should be ordered, and reserve the right to file their views on the mandate later.

DISSENTING OPINION.

RABB, J.—I do not concur in the mandate of the court in directing a judgment against appellee Essington on the general verdict. I think it manifestly appears from the record before us that such judgment will operate as a rank injustice to said appellee, and that the case is one requiring this court, in the exercise of its discretion, to direct a new trial. *Sinker, Davis & Co. v. Green* (1888), 113 Ind. 264; *Buchanan v. Milligan* (1886), 103 Ind. 433; *Murdock v. Cox* (1889), 118 Ind. 266; *Wendel v. Cleveland, etc., R. Co.* (1908), 41 Ind. App. 460; *Richey v. McKay* (1905), 36 Ind. App. 539.

In my view, all those averments in the complaint, with reference to the conveyance by appellee Essington to her co-appellee, Indianapolis Northern Traction Company, of the land upon which the trespass is alleged to have been committed, the intention of the parties in making such conveyance, and the averment that, after the execution of the conveyance, Essington authorized the traction company to take possession of the land, are mere surplusage, presenting no issuable facts, and are therefore not established by the general verdict.

The substantive averments of the complaint, the issuable facts charged, which the general verdict in favor of appellant established as true, are the facts that appellant was tenant of appellee Essington, in the lawful possession of the premises, and that "defendants unlawfully entered upon the premises, tore down the fences, destroyed the crops," etc. These averments charged a joint trespass, and made a good case against both appellees, but clearly did not authorize a judgment against either of the parties for separate acts of trespass committed by the other, although it might appear that each of the two parties had separately trespassed upon appellant's possession.

Here the general verdict finds that appellee Essington

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alone committed the acts of trespass charged, or some of them; that is, that Essington "unlawfully entered upon appellant's possession, tore down the fences, permitting the stock to escape, destroyed the crops," etc.

Among other interrogatories submitted to the jury and the answers were the following: "State what, if any, fences on said real estate, defendant Essington tore down, through which any stock of said plaintiff escaped, after taking possession thereof by the Indianapolis Northern Traction Company? A. None." "What occupancy or control did defendant Mary E. Essington exercise over said real estate after she conveyed the same to her codefendant, except to take some timber off of the right of way thereof? A. None." "If defendant Mary E. Essington cut some timber off of the right of way of said real estate, was she in any way assisted by the employes or servants of defendant? A. No, sir."

It is not charged in the complaint that appellees or either of them cut and removed timber from the premises, and the cutting and removing of timber is not relied on in any way as causing the injury sued for, and would clearly entitle appellant to merely nominal damages, if such were the basis of the action.

The answers to these interrogatories are clearly antagonistic to the general verdict against appellee Essington, and would require an affirmance of the judgment, were it not for the answer returned by the jury to the fourth interrogatory submitted to it, which was as follows: "Did defendant Mary E. Essington, in common and with concertive action and with defendant Indianapolis Northern Traction Company, enter upon and take possession of said real estate so conveyed by her to said defendant, and plow up and dig up the same, and construct a railroad thereon? A. Yes." The answer to this interrogatory is plainly contradictory to those already referred to, and under the strict

technical rules that forbid the court to consider contradictory answers to interrogatories on a motion for a judgment on answers to interrogatories, notwithstanding the general verdict, requires the reversal of the judgment by this court. But I think it quite manifest that this answer to the fourth interrogatory submitted to the jury was the result of a misconception on its part of the purport of the interrogatory. This is made quite clear by the answer to the fifth interrogatory, which was as follows: "If your answer to the foregoing interrogatory is 'yes,' state when and what action said defendant Mary E. Essington did and performed in common and with concertive action with her codefendant?" This is answered as follows: "Removed timber about May 1, 1903."

I think it is thus made apparent that what the jury intended to find by the answer to the interrogatories, and all it intended to find as against defendant Mary E. Essington, was that after she conveyed the premises to the traction company, she, without the traction company's having anything to do with it, entered upon the premises and cut down and removed some timber therefrom, and that all of the injurious acts charged in the complaint to have been done were done by the traction company alone, and that the general verdict was returned against appellee Essington, because she had sold and conveyed the property in question to the traction company, and had received from it the consideration expressed in the deed.

I think enough appears from the answers to these interrogatories to show clearly to the court the real state of the case, and that all that Essington did was to sell and convey to the company the tract of land in question. Such sale and conveyance by her created no liability on her part for any act of the traction company. She had the right to sell her interest in the land, and to convey it by warranty deed, and her deed conveyed to the company no right whatever, and

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afforded no authority to the company wrongfully to enter upon appellant's possession.

It appears from the averments of the complaint that the traction company took the conveyance with full knowledge of all of appellant's rights, that he was the tenant of appellee Essington, and by the terms of the statute, when appellee company took possession of the land appellant's possession was its possession, and appellant became the tenant of the traction company, with the same rights against the traction company that he had against the original landlord. §8061 Burns 1908, §5215 R. S. 1881; *Lindley v. Dakin* (1859), 13 Ind. 388; *Page v. Lashley* (1860), 15 Ind. 152; *Kellum v. Berkshire Life Ins. Co.* (1885), 101 Ind. 455; *Swope v. Hopkins* (1889), 119 Ind. 125; *Ream v. Goslee* (1898), 21 Ind. App. 241.

The consideration received by Essington for the conveyance of the land is presumed to be the consideration for her interest in the premises, and not to represent and pay for something which she had no right or authority to sell, and which she did not undertake to convey. After she conveyed the land to the traction company, before it could have any right to enter upon the premises as against appellant, it was its duty to acquire, in some appropriate way, the right as against him, and until it did so an entry upon his possession without his consent was a trespass, but not one for which the original landlord would be liable.

In my judgment, from the facts made apparent by the answers to interrogatories, it is clear that at most appellant had a right to but nominal damages against appellee Essington, and that therefore the direction to render judgment upon the general verdict is not a proper mandate.

Myers, J., concurs.

BOTTORFF v. BOTTORFF.

[No. 6,954. Filed April 26, 1910.]

1. JUDGMENT.—*Res Judicata*.—*Parties*.—A judgment is not binding upon a person who was neither a party nor privy to such judgment. p. 692.
2. APPEAL.—*Making Instructions Part of Record*.—*Statutes*.—Under §561 Burns 1908, Acts 1907, p. 652, §1, instructions given by the judge on his own motion and not signed by him, are not a part of the record on appeal. p. 692.
3. TRIAL.—*Instructions*.—*Failure to Sign*.—*Correction by Nunc Pro Tunc Entry*.—The function of a *nunc pro tunc* entry is to make a record of something that was done, and the failure of a judge to sign instructions cannot be remedied by a *nunc pro tunc* entry. p. 693.
4. EVIDENCE.—*Letters*.—*Relevancy*.—Letters that are not relevant to the issues in a case are not admissible in evidence. p. 693.
5. WITNESSES.—*Impeachment*.—*Collateral Matters*.—A witness may not be contradicted, as to collateral matters, by evidence of contradictory statements contained in letters. p. 693.

From Scott Circuit Court; *Joseph H. Shea*, Judge.

Action by James G. Bottorff against Thomas E. Bottorff. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Laurent A. Douglass, for appellant.

J. K. Marsh, for appellee.

ROBY, J.—Replevin for horse, buggy and harness by appellee, who had a verdict and judgment. The complaint states a cause of action. §1330 Burns 1908, §1266 R. S. 1881.

A demurrer was sustained to appellant's second paragraph of answer, which attempted to set up former adjudication. The facts pleaded do not show that appellee

1. was a party or privy to the judgment relied upon, and the ruling was therefore correct.

The instructions are not in the record. An attempt was made to incorporate them under the provisions of

2. the act of 1907 (Acts 1907, p. 652, §1, §561 Burns 1908).

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This act requires that instructions given by the judge of his own motion shall be signed by him, which was not done. *Wiseman v. Gouldsberry* (1910), *ante*, 677; *Vandalia Coal Co. v. Yemm* (1910), — Ind. —. An attempt was made to remedy the omission by a *nunc pro tunc*

3. entry, but the finding shows that the judge through inadvertence did not sign the instructions. The function of a *nunc pro tunc* entry is to make a record of something that was done and not recorded. It cannot be used to make the record show action which was not in fact taken. *Walters v. Uhl* (1891), 3 Ind. App. 219.

Complaint is made of the admission in evidence of two letters written by appellee to appellant. The con-

4. tents of such letters are not relevant to the issue. It is claimed that they were admissible as bearing upon the credibility of appellee's testimony. It is not com-

5. petent to contradict a witness as to collateral matter. *Firemans Fund Ins. Co. v. Dunn* (1899), 22 Ind. App. 382.

The evidence sustains the verdict. The lawsuit is between two brothers, and involves property of small value. The appeal should not have been taken.

The judgment is affirmed.

RAGLE ET AL. v. DEDMAN ET AL.

[No. 7,619. Filed April 27, 1910.]

1. **APPEAL.—Time for Taking.**—An appeal may be taken at any time within one year from the rendition of the judgment appealed from; and an appeal is taken at the time of the filing of the transcript with the Clerk of the Supreme Court. p. 695.
2. **JUDGMENT.—Final.**—Where a judgment was rendered in favor of some of the defendants on January 9, and for the remaining one on March 26, an appeal taken on the following January 23, is in time, the judgment being final as to all parties on March 26. p. 695.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by John W. Ragle and others against Eliza J. Dedman and others. From a judgment for defendants, plaintiffs appeal. On motion to dismiss appeal. *Motion overruled.* (For decision on merits, see — Ind. App. —.

Stanley M. Kreig, Cicero Fettinger and William D. Curll. for appellant.

Tweedy & Youngblood, for appellee.

COMSTOCK, J.—Appellees severally move that the court dismiss the appeal in this cause, upon the following grounds: (1) That said appeal was not taken within one year from the rendition of the judgment appealed from, as required by law; (2) that the judgment against each and all of the appellees, except appellee Oliver Dedman, from which said appeal was taken, was rendered in the Dubois Circuit Court on January 9, 1909, and the transcript was not filed in this court until March 23, 1910, and no summons was served upon said appellees until after the expiration of one year following the date of the judgment herein appealed from, and that the only judgment rendered in said cause as to appellee Oliver Dedman was a judgment of dismissal of said cause on the voluntary motion of dismissal by appellants as plaintiffs below.

The record discloses that the cause was filed in the Pike Circuit Court at the July term, 1908. On July 23, 1908, the cause on change of venue was sent to the Dubois Circuit Court. On January 9, 1909, plaintiffs filed their demurrer to the second and third paragraphs of the amended answer of defendants Eliza Dedman, Gilbert Dedman, Bessie Dedman, Lulu Dedman, Walter Smith and Clara Smith, and also filed their demurrer to the second and third paragraphs of the separate answer of Oliver Dedman, which demurrers were by the court sustained. On the same day defendants Eliza Dedman and others asked and prayed that the demurrer of plaintiffs to their said answer be carried back to the complaint, which was done, and the court sustained

said demurrer to plaintiffs' complaint, and "failing to plead further and electing to stand on their complaint as against said defendants," it was ordered and adjudged by the court that plaintiffs take nothing by their suit as against Eliza Dedman, Rousseau Dedman, Gilbert Dedman, Bessie Dedman, Lula Dedman, Walter Smith and Clara Smith, and that said defendants recover of and from plaintiffs all of their costs."

Plaintiffs prayed an appeal to this court, which was granted, and by agreement the cause was continued as to defendant Oliver Dedman. On March 26, 1909, the cause, on plaintiffs' motion, was dismissed as to Oliver Dedman, at plaintiffs' costs. It thus appears that judgment in favor of appellees, except as to Oliver Dedman, was rendered on January 9, 1909. The transcript was filed in this court on January 23, 1910.

An appeal to the Appellate Court cannot be taken after the expiration of one year from the rendition of the judgment appealed from. §670 Burns 1908, §631 R. S.

1. 1881. Appeals are taken from the time of filing the transcript with the Clerk of the Supreme Court (*Harshman v. Armstrong* [1873], 43 Ind. 126; *Lake Erie, etc., R. Co. v. Watkins* [1902], 157 Ind. 600), but a judgment is not final unless it disposes of the cause, both
2. as to the subject-matter and the parties, so far as the court before which it is pending has power so to do. *Starkey v. Starkey* (1906), 166 Ind. 140, and authorities cited. The cause was still pending up to March 26, 1909. Within a year from that date the transcript was filed in the Appellate Court.

Motion to dismiss appeal overruled.

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MCGARY v. YEAGER.

[No. 7,117. Filed April 27, 1910.]

APPEAL.—*Omission of Evidence from Bills of Exceptions.—New Trial.*—An assignment that the court erred in overruling appellant's motion for a new trial cannot be considered, where the questions depend upon the evidence, and some of the evidence pertaining thereto is affirmatively shown by the bill of exceptions to be omitted.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by Elgin A. Yeager against Hugh D. McGary. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Thomas Duncan and *Clyde McGary*, for appellant.

Thomas M. McDonald and *Morton C. Embree*, for appellee.

ROBY, J.—This was an action to recover damages for the wrongful act of appellant in sending out of the State of Indiana, for the purpose of collection by garnishment, an account against appellee, who was a citizen of the State of Indiana, and a man who was entitled to the benefits of the exemption laws of the State of Indiana.

Appellee had a verdict and judgment for \$345. The only assignment is that the court erred in overruling appellant's motion for a new trial. There is a bill of exceptions in the record, which purports to contain all of the evidence in the case, but it affirmatively appears on the face of the bill that certain receipts and the original assignment of the claim were received and read in evidence, but were omitted from the transcript thereof.

The grounds stated for a new trial are dependent upon the evidence, and in its absence the action of the trial court will not be reviewed. *Pittsburgh, etc., R. Co. v. Greb* (1905). 54 Ind. App. 625; *Standley v. Cleveland, etc., R. Co.*

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(1905), 36 Ind. App. 381. There are exceptions to the rule, but the case does not come within them. *Cincinnati, etc., St. R. Co. v. Stahle* (1906), 37 Ind. App. 539.

Judgment affirmed.

VANDALIA RAILROAD COMPANY v. BLUM ET AL.

[No. 6,863. Filed April 27, 1910.]

1. RAILROADS.—*Fences*.—*Notice*.—A notice given by a landowner, under §5448 Burns 1908, Acts 1885, p. 224, §2, providing for the construction of a new fence, is proper, where the old fence was so out of repair that a new one was needed. p. 697.
2. APPEAL.—*Affirmance*.—*Penalty*.—The Appellate Court may, on affirming a judgment, impose a penalty. p. 698.

From Dekalb Circuit Court; *Emmett A. Bratton*, Judge.

Action by August F. Blum and another against the Vandalia Railroad Company. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Anderson, Parker & Crabill, John G. Williams and J. E. & J. H. Rose, for appellant.

WATSON, J.—This is an appeal from a judgment of \$141.50, rendered against appellant for the cost of a fence built along a portion of its right of way by an adjoining landowner.

The error relied upon for reversal is the overruling of appellant's motion for a new trial.

The first point raised is on the admission in evidence of the notice to the railroad company, appellant contending that it was not given according to §5449 Burns 1908.

1 Acts 1885, p. 224, §3, which provides for the repairing of fences along tracks; that the notice to the company, by its agent, should state that the fence is out of repair, where it is out of repair, and the probable cost of fixing it. From the averments of the complaint and the evidence

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given in said cause it is shown that a fence had been built by the company along its right of way some thirty-five or thirty-six years ago, but at the time of the notice, and for a long time prior thereto, there had been practically no fence along such right of way; that it was in such a condition that a new fence had to be built, instead of repairing the old one. The notice to the company contemplated the building of a new fence, as provided under §5448 Burns 1908, Acts 1885, p. 224, §2. The facts justify the giving of such a notice and the proceedings in accordance therewith. *Vandalia R. Co. v. Kanarr* (1906), 38 Ind. App. 146.

The evidence sustains the allegations of the complaint, and warrants the conclusions reached by the trial court.

Judgment affirmed, with ten per cent penalty.

WIRRICK ET AL. v. BOYLES ET AL.

[No. 7,142. Filed April 29, 1910.]

1. **APPEAL**.—*Transfer to Appellate Court.*—*Presumptions.*—Where the Supreme Court transfers an appeal to the Appellate Court, it may be presumed that such appeal should have been taken to the Appellate Court in the first instance. p. 699.
2. **APPEAL**.—*Briefs.*—*Failure to Set Out Record.*—*Waiver.*—Appellants' failure to set out in words, or substance, the questioned demurrer, constitutes a waiver of any questions thereon. p. 700.
3. **INJUNCTION**.—*Continued Trespasses.*—*Multiplicity of Actions.*—*Equity.*—*Complaint.*—A complaint alleging that defendant destroyed plaintiffs' fence, that plaintiffs rebuilt it, and defendant again destroyed it, and threatened to destroy any fence that might be subsequently erected, states a cause of action, equity having jurisdiction on the ground of preventing a multiplicity of actions. p. 700.
4. **TRESPASS**.—*Continuing.*—*Adverse Possession.*—*Multiplicity.*—Where defendant twice destroyed the plaintiffs' fence and threatened to continue its destruction, he may be enjoined, since such continuing acts constitute a basis for the claim of title by adverse possession, and also the remedy at law is inadequate. p. 700.

From Pulaski Circuit Court; *F. J. Vurpillat*, Special Judge.

Action by John G. Boyles and another against Julia T. Wirrick and others. From a decree for plaintiffs, defendants appeal. *Affirmed*.

Spangler & Spangler and *M. Winfield*, for appellants.

Henry A. Steis, for appellees.

MYERS, C. J.—Appellees by a verified complaint in the court below sued Jacob Wirrick, who after the trial, and after perfecting this appeal in the Supreme Court, died. On petition to the Supreme Court the appellants, as the heirs of said Wirrick, were substituted as parties appellant. There-

after the last-named court transferred the case to

1. this court, and from that action we may assume that the case should have been appealed to this court in the first instance.

Appellees, as it appears from their complaint, claimed to be the owners in fee simple and as tenants in common of a certain described strip of land, sixteen and one-half feet wide and eight rods long, situated in the town of Winamac, Indiana. It is also shown that they erected a substantial wire fence on the east line of their said premises, for the purpose of enclosing them, which fence on May 14, 1906, was by said Wirrick wrongfully and forcibly torn down and destroyed without the knowledge or consent of appellees; that appellees rebuilt said fence, and it was again torn down by said Wirrick, who, under a claim of right to enter upon said land at will and for any purpose of his own, threatens to destroy, and will, unless enjoined, continue to destroy, any fence posts which are now standing or may hereafter be set for the purpose of such fence. Other facts were alleged. The complaint was for an injunction. It was answered by a general denial. Trial by the court. The facts were specially found and conclusions of law stated

thereon. Judgment was rendered in favor of appellees, permanently enjoining said Wirrick from in any manner interfering with said enclosure.

The questions presented for our consideration are grounded upon the exceptions to the conclusions of law, and the overruling of defendants' motion in arrest of judgment.

Appellants first insist that the court erred in overruling the demurrer to the complaint. To this insistence appellees

earnestly contend that the failure of appellants to

2. set forth in their brief the demurrer, or the substance thereof, must be considered as a waiver of such alleged error. The decisions of the Supreme Court sustain their contention. *Knickerbocker Ice Co. v. Gray* (1905), 165 Ind. 140; *Chicago, etc., R. Co. v. Walton* (1905), 165 Ind. 253. However, we have given the complaint consider-

ation as to facts, and conclude that it was sufficient,

3. on the theory that it exhibits facts showing continued acts of trespass by said Wirrick upon the land of appellees, for which redress at law would necessarily require a multiplicity of actions, and would not be as adequate or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Miller v. Bowers* (1902), 30 Ind. App. 116; *Wabash R. Co. v. Engleman* (1903), 160 Ind. 329.

Turning to the conclusions of law stated upon the special finding of facts and the motion in arrest of judgment, it will be seen from the findings, as well as from the com-

4. plaint, that appellees were the owners in fee simple, as tenants in common, of a certain parcel of land, sixteen feet wide and eight rods long, immediately adjoining and on the west side of certain land owned by appellants, which strip of land appellees had recently enclosed with a wire fence. Jacob Wirrick did not claim title to the land so enclosed, nor did he dispute the title of appellees, but supposing that the strip was a public alley, and that

he had a right to use it, without malice he cut and removed the fence for the purpose of using the strip at will as an alley and to gain access to his land adjoining it. Appellees rebuilt the fence, but said Wirrick again destroyed it, and threatened to do so thereafter as often as it might be replaced, and to use the strip of land at his pleasure, adverse to appellees' ownership and right of the exclusive possession thereof.

It is contended, upon behalf of appellants, that a suit for injunction would not lie, and that there was an adequate remedy at law.

The facts stated and found constitute a continuous trespass, and if the action of said Wirrick done and threatened were continued indefinitely the foundation of adverse rights might be laid and an injunction would not only prevent such accrual of right, but would also prevent a multiplicity of actions for trespass. *Town of Syracuse v. Weyrick* (1906), 37 Ind. App. 56. "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." 4 Pomeroy, Eq. Jurisp. (3d ed.), §1357.

"Courts of equity interfere in cases of trespass, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation." 2 Story, Eq. Jurisp. (11th ed.), §928; and see *Clark v. Jeffersonville, etc., R. Co.* (1873), 44 Ind. 248. In the case of *Lewis v. Rough* (1866), 26 Ind. 398, 400, it was said: "If the defendants committed the threatened trespass, and the plaintiff established his right at law, and the defendants nevertheless persist in the wrongful use of plaintiff's lands for the purpose of a highway, then a court of equity would

grant relief, on the ground of suppressing litigation, and of preventing a multiplicity of suits.”

Judgment affirmed.

VANDALIA RAILROAD COMPANY v. WALKER.

[No. 6,839. Filed April 29, 1910.]

RAILROADS.—*Fencing Rights of Way.—Statutes.*—The object of laws requiring railroad companies to fence their rights of way, is for the protection of life and property.

From Dekalb Circuit Court; *Emmet A. Bratton*, Judge.

Action by Anna Walker against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Anderson, Parker & Crabill, J. G. Williams and J. E. & J. H. Rose, for appellant.

WATSON, J.—This is an action by appellee to recover from appellant the sum of \$149.02, for the expense incurred in building a fence along its right of way passing over her land.

The primary object of the legislature in enacting the law requiring railroad companies to fence their tracks, and to maintain them is for the protection of life and property. It should be adhered to by the railroads, and, if not, should be enforced by the landowners.

This is a companion case to *Vandalia R. Co. v. Blum* (1910), *ante*, 697. The same questions are involved here as in that case, and upon the authority of that case this one is affirmed.

Judgment affirmed with ten per cent penalty.

VANDALIA RAILROAD COMPANY v. MUHN ET AL.

[No. 6,958. Filed April 29, 1910.]

1. RAILROADS.—*Fences.—Complaint.*—A complaint following the requirements of the statute for the building of fences along a railroad right of way, is sufficient. p. 703.
2. RAILROADS.—*Fences.—Notice.*—A notice given by a landowner, under §5448 Burns 1908, Acts 1885, p. 224, §2, providing for the construction of a new fence, is proper, where the old fence was so out of repair that a new one was needed. p. 704.
3. APPEAL.—*Affirmance.—Right Result.*—A judgment which is right upon the evidence, will be affirmed. p. 704.
4. APPEAL.—*Affirmance.—Penalties.*—The Appellate Court may, on affirming a judgment, impose a penalty. p. 704.

From Dekalb Circuit Court; *Emmet A. Bratton*, Judge.

Action by Perry Muhn and another against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Anderson, Parker & Crabill, John G. Williams and J. E. & J. H. Rose, for appellant.

Dan M. Link, for appellees.

WATSON, J.—This was an action brought by appellees, landowners, to recover the cost of constructing a fence built by them upon the right of way of appellant, where it runs through their land. To the complaint a demurrer was filed, which was overruled, and exceptions were taken. The cause was put at issue by the filing of a general denial. Trial by court, and finding and judgment for appellees in the sum of \$101.01, from which this appeal is prosecuted.

The assignments are that the court erred (1) in overruling the demurrer to the complaint, and (2) in overruling the motion for a new trial.

The complaint is within the requirements of the statute in this class of cases, and the demurrer was there-

1. fore properly overruled. *Chicago, etc., R. Co. v. Vert* (1900), 24 Ind. App. 78; *Evansville, etc., R. Co. v. Butts* (1901), 26 Ind. App. 418.

The notice to the company by the landowners was such as is provided for under §5448 Burns 1908, Acts 1885, p. 224, §2, and contemplated the building of a fence. The appel-

2. lant objects to the admission in evidence of this notice for the reason that it should have been given under §5449 Burns 1908, Acts 1885, p. 224, §2, which relates to the repairing of fences along the track of a railroad, because heretofore there existed a fence along the track where the fence was built, for the cost of which this action was brought. The evidence upon the whole shows that this fence had practically rusted and rotted away. There were a few posts left and some rusty wire, but they were of no value and of no use in repairing a fence. There was, in fact, no fence to repair. The notice was correctly given. *Vandalia R. Co. v. Kanarr* (1906), 38 Ind. App. 146.

The decision was not contrary to the evidence nor

3. contrary to law. The evidence sustains the allegations of the complaint, and the correct result was reached by the trial court.
4. Judgment affirmed, with ten per cent damages.
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HAYES ET AL. v. MARTZ ET AL.

[No. 5,974. Filed April 21, 1908. Rehearing denied March 30, 1909. Transferred to Supreme Court October 15, 1909.]

1. WILLS.—*Construction.—Intention.*—A will should be so construed as to carry out the intention of the testator, and the courts in doing so will consider all parts thereof. p. 706.
2. WILLS.—*Conditions.—Failure of.*—A provision in a will that if the devisee should die before he becomes twenty-one years old the property shall go to certain persons, will not be considered, where such devisee attained such age. p. 707.
3. WILLS.—*Language of.*—“*Descend.*”—The word “descend,” as used in a will providing that “if said John Horsely Hayes shall die leaving children, the farm shall descend to them,” means to “go to,” p. 707.
4. WILLS.—*Devise of Fee Simple.—Subsequent Words Cutting Down.*—Where a provision of a will gave to the devisee a fee-

Hayes v. Martz—45 Ind. App. 704.

simple title, a subsequent clause, to cut down such estate, must use language equally clear and specific, limiting such estate. p. 708.

5. **WILLS.**—*Derise of Fee Simple.—Limiting.*—A will in form: "I will and bequeath unto my grandson * * * the farm on which I now live," and further providing in a subsequent clause that if such grandson should "die before he attains the age of twenty-one years, the property hereby willed to him shall be equally divided between my two children" and that if such grandson should "die leaving children, the farm shall descend to them, but it is not to be sold or disposed of by said" grandson, gives to such grandson a fee simple p. 709.

From Noble Circuit Court; *Joseph W. Adair*, Judge.

Suit by William D. Hayes and others against Anna Martz and others. From a decree for defendants, plaintiffs appeal. *Affirmed.*

Transferred to Supreme Court (see 173 Ind. 279).

Wigton & Green, Peters & Peters and Robert W. McBride, for appellants.

T. A. Redmond, A. C. Harris, R. P. Barr and L. H. Wrigley, for appellees.

WATSON, J.—This was a suit by appellants against appellees to quiet their title to certain land in Noble county, Indiana. Certain of the appellees filed cross-complaints, asserting title to portions of the land, and asking that their respective titles be quieted.

There was a trial by the court. Special findings were made, and conclusions of law stated thereon.

The decision of this case depends upon the construction of the will of John Horsely, great grandfather of appellants.

The court found that said John Horsely executed his last will and testament on October 5, 1848. The items thereof, upon the interpretation of which this case depends, are as follows:

"Item two. I will and bequeath unto my grandson, John Horsely Hayes, son of Jarvis and Mary Hayes, deceased, the farm on which I now live [describing it],

and I also bequeath to my grandson, John Horsely Hayes, \$500 out of the proceeds of my personal estate.”
“Item five. * * * And I further will, shall die before he attains the age of twenty-one years, the property hereby willed to him shall be equally divided between my two children, Richard Horsely and Ann Selder. And if said John Horsely Hayes shall die leaving children, the farm shall descend to them, but it is not to be sold or disposed of by said John Horsely Hayes.”

The court further found the fact of John Horsely's death, and that said will was duly probated on March 12, 1850; that the devisee, John Horsely Hayes, was, at the time of such probate, less than twenty-one years of age, and was not married, and none of appellants, children of said John Horsely Hayes, were born until after 1866; that on March 16, 1866, said John Horsely Hayes, being then more than twenty-one years of age, conveyed said farm, by a deed of general warranty, to Henry S. Kimmell, who paid \$8,000 therefor. Appellees assert title to the land in question through conveyances by warranty deed from said Kimmell.

The conclusions of law were that appellants had no interest in the real estate in question; that appellees have judgment for costs, and that their titles to their several parts of said land be quieted.

Appellants excepted to the conclusions of law and assigned error on the overruling thereof.

Appellees contend, and it is conceded by appellants, that the second item of the will, standing alone, granted a fee simple in the land to John Horsely Hayes, but it is further urged by appellants that by reason of the fifth item in said will, said John Horsely Hayes's interest became a “conditional, terminable or limited fee-simple estate.”

It is an elementary rule of construction that a will should be so construed as to carry into effect the intention of the testator; and that such intention will be determined

1. by an examination of the entire will, and not from fragmentary clauses or statements.

Admitting, for the sake of argument, that the condition, that if John Horsely Hayes died before attaining the age of twenty-one years the 'property should be divided

2. between Richard Horsely and Ann Selder established a conditional or terminable fee, it is not material to the decision of this case, for the reason that the event which would terminate such fee has failed to occur within the prescribed time, and the estate has thereby become vested in said Hayes.

But appellants contend that in the clause,

“and if said John Horsely Hayes shall die leaving children, the farm shall descend to them, but it is not to be sold or disposed of by said John Horsely Hayes,”

the word “descend,” as therein used, means “go to,”

3. and that the testator intended thereby to limit a fee to such children upon the fee devised to John Horsely Hayes.

It seems to be an accepted rule that where, by the terms of a will, an ancestor takes a life estate, and the remainder is “to descend” to persons who would be his heirs, the word “descend” will be interpreted to mean “go to,” for the reason that after a life estate there is nothing to descend, and the devise operates to pass a fee to the remainderman immediately upon the death of the testator, possession only being postponed.

Likewise, where the word is used in connection with persons who would not take the property by operation of law, as descendants, it has been interpreted to mean “go to.”

The authorities cited by appellants support these propositions, but they are not applicable to the facts in this case. There is nothing in the will to show that the testator intended to give said Hayes merely a life estate, and, as before stated, appellants concede that his interest was not that of a life tenant.

In the case of *Halstead v. Hall* (1883), 60 Md. 209, cited by appellants, it is said: “The use of the word ‘descend,’ in

a will, it is said in *Dennett v. Dennett* [1860], 40 N. H. 498, does not operate to work a descent in the legal, strict sense of the term, as inheritance is through operation of law; its employment, therefore, unless some other meaning is apparent, is to be taken as indicating the desire of the testator that his property shall follow the same channel into which the law would direct it."

In the case at bar the word "descend" is used in connection with parties who would take the property as heirs of the devisee Hayes if he still retained the title at his decease. The fifth item of the will is open, therefore, to the construction that the testator desired the law to take its course after the decease of the devisee Hayes, and in order to accomplish it he attempted to restrict said Hayes's power of alienating such estate.

Where in one clause of the will real estate is devised in fee simple, in clear and decisive terms, it cannot be cut down by a subsequent clause, by any inference therefrom,

4. or by any subsequent words that are not as clear and decisive as the words of the clause giving the fee simple; and where a devise is plainly given in fee it will not be presumed that the testator meant by any subsequent words to reduce the estate to a conditional fee, unless the language employed so indicates such intent and is as clear and in as strong terms as the words used in giving the fee simple estate. *Logan v. Sills* (1902), 28 Ind. App. 170; *Hume v. McHaffie* (1907), 40 Ind. App. 703; *Bailey v. Sanger* (1886), 108 Ind. 264; *Wright v. Charley* (1891), 129 Ind. 257; *Ross v. Ross* (1893), 135 Ind. 367; *Rogers v. Winklespleck* (1896), 143 Ind. 373; *Mulvaney v. Rude* (1896), 146 Ind. 476; *Rusk v. Zuck* (1897), 147 Ind. 388; *Langman v. Marbe* (1901), 156 Ind. 330; *Snodgrass v. Brandenburg* (1905), 164 Ind. 59, and cases cited; Schouler, Wills (3d ed.), §559.

It is evident that the second item of the will is sufficient of itself to invest said Hayes with the fee simple of the land

in question. The subsequent item is not sufficiently
5. clear to enable us to say, as a matter of construction,
that the testator intended to cut down and limit the
estate first granted, and deprive the devisee of the fee of the
rights and privileges attaching thereto, one of which rights
is the power of alienation.

It is also urged by appellants that the testator attempted
to establish a fee tail, which by statute (R. S. 1843, p. 424)
became a fee simple, but in this case a fee simple subject to
a contingent remainder in favor of Hayes's children. The
question is whether said children took a contingent re-
mainder in the farm in controversy.

In *Wild's Case* (1599), 6 Coke *17, the devise was to
"Rowland Wild and his wife, and after their decease to
their children," and the court held that where land was de-
vised to one and his children, if there were no children *in*
esse at the time of the devise, the estate was an estate tail,
for the reason that such children, not being *in esse*, could
not take as devisees, and they could not take by way of re-
mainder, for that was not the intention of the testator. This
is the law in Indiana. *Moore v. Gary* (1897), 149 Ind. 51;
Biggs v. McCarty (1882), 86 Ind. 352, 44 Am. Rep. 320;
King v. Rea (1877), 56 Ind. 1, 15.

The case of *Moore v. Gary*, *supra*, is urged in support of
the contention that devisee Hayes took a determinable and
not an absolute fee simple. In that case there was a devise
of both personal and real property to one Wells "and to his
heirs, being his children, forever." It was then further pro-
vided that if said Wells die without lawfully begotten chil-
dren living at the time of his death, then all the property
was to be reduced to money and otherwise disposed of.

The contention was that Wells took a fee simple, and that
the devise over was void.

The court held that Wells, by the terms of the will, took
an estate tail, which, though declared by the statute (R. S.
1843, p. 424, §56), to be a fee simple, was not a fee simple

absolute, for the reason that there was a devise of the remainder over, and, by the same statute, the limitation of the remainder over was valid.

The facts of that case, therefore, are not parallel with those of the case at bar. Furthermore, it does not hold that where there is an attempt to establish an estate tail the ancestor takes a fee simple subject to a contingent remainder in the children. In this case there was no attempt by the testator to devise the remainder over.

Therefore, giving the will this construction, by operation of the statute (R. S. 1843, p. 424, §56), John Horsely Hayes, at the death of the testator, was vested with a fee simple in the farm devised.

Judgment affirmed.

ON PETITION FOR REHEARING.

WATSON, J.—Counsel for appellants urgently insist that the opinion in this case inadvertently states that it was contended by appellants that the will of John Horsely established a fee-tail estate. We did not understand counsel to withdraw, during the course of the oral argument, the argument to that effect advanced in the brief. Counsel earnestly urge that not only do they not contend that the will established a fee-tail estate, but, on the contrary, that they admit that in point of law such an estate was not created thereby. It is therefore just that appellants' position on that question be made clear. Since it is admitted, however, by both parties, that we correctly stated the law, we can perceive of no good reason for objecting thereto.

We agree with counsel that the rule on *Wild's Case* (1599), 16 Coke *17, as originally stated in the opinion, is too broad, and we have modified the original opinion accordingly, to meet the objections urged by appellants.

We have carefully considered appellants' petition and brief for rehearing, but find no reasons therein which con-

Copeland v. Bruning—45 Ind. App. 711.

vince us that the principal opinion in this case should be otherwise modified. It may be that testator attempted to limit, in a manner, the fee simple devised in this will; but, for the reasons given in the original opinion, the attempt was unsuccessful.

We are not persuaded that the disputed items of the will are open to the construction contended for by appellants.

The petition for rehearing is therefore denied.

COPELAND ET AL. v. BRUNING ET AL.

[No. 6,548. Filed March 31, 1909. Rehearing denied June 23, 1909.
Transfer denied December 14, 1909.]

From Clark Circuit Court; *H. C. Montgomery*, Judge.

Suit by Clara Copeland and another against William H. Bruning and another, as trustees under the will of John F. Bruning, deceased. From a judgment for defendants, plaintiffs appeal. *Affirmed.*

Pickens, Moores, Davidson & Pickens, W. T. Friedley, P. E. Bear and *Vanosdol & Francisco*, for appellants.

F. Winter, Bernard Korbly and *S. M. McGregor*, for appellees.

RABB, J.—This was a proceeding instituted by the appellants in the court below to remove the appellees as trustees under the will of John F. Bruning, deceased, and involves precisely the same questions that are presented in *Copeland v. Bruning* (1909), 44 Ind. App. 405, and for the reasons set forth in the opinion in that case, the judgment is affirmed.

Watson, C. J., did not participate.

CRONIN v. ZIMMERMAN.

[No. 6,694. Filed January 5, 1910.]

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Bessie Cronin against Arthur F. Zimmerman. From a judgment for defendant, plaintiff appeals. *Reversed.*

*Bessie Cronin, pro se.**Johnston & Bartholomew*, for appellee.

HADLEY, J.—Appellant sued appellee for libel. Appellee demurred to appellant's complaint for want of facts, which demurrer was sustained. Appellant refusing to plead further, judgment was rendered against her.

The complaint in all substantial particulars is the same as the complaint in *Cronin v. Zimmerman* (1909), 44 Ind. App. 118, and upon the authority and reasoning of that case this cause is reversed, with instructions to overrule demurrer to the complaint.

**PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. PECK.**

[No. 6,331. Filed January 7, 1910.]

From Cass Circuit Court; *Joseph M. Rabb*, Special Judge.

Action by Charles M. Peck against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment on a verdict for \$4,000, defendant appeals. (Transferred from Appellate Court, 43 Ind. App. 316. Transferred back to the Appellate Court, 172 Ind. 19. Retransferred to the Supreme Court, 44 Ind. App. 62. Retransferred to the Appellate Court, 172 Ind. 562.) *Retransferred to the Supreme Court.* (The appellee having died, his administrator and the appellant, compromised the case; and the judgment was reversed by the Supreme Court on a confession of error in accordance with such agreement.—Reporter.)

G. E. Ross, for appellant.*Kistler & Kistler*, for appellee.

PER CURIAM.—This cause being submitted to the entire court and four judges not concurring in the result, the case is hereby transferred to the Supreme Court under section fifteen of the act approved March 12, 1901 (Acts 1901, p. 565, §1399 Burns 1908).

Vandalia R. Co. v. Smith—45 Ind. App. 713.

**BAKER ET AL. v. THE STATE OF INDIANA, EX REL.
NOELTING ET AL.**

[No. 6,932. Filed January 12, 1910.]

From Martin Circuit Court; *H. Q. Houghton*, Judge.

Action by the State of Indiana, on the relation of Ida Noelting and others, against August Baker and others. From a judgment for plaintiff, defendants appeal. *Affirmed*.

F. Guinn and *Cullop & Shaw*, for appellants.

James S. Pritchett, *A. J. Padgett* and *Gardiner, Tharp & Gardiner*, for appellee.

PER CURIAM.—The record in this case presents precisely the same questions that were presented in the case of *Berkemier v. State, ex rel.*, (1909), 44 Ind. App. 1, and upon the authority of that case, the judgment of the court below is affirmed.

VANDALIA RAILROAD COMPANY v. SMITH ET AL.

[No. 6,838. Filed April 27, 1910.]

From Dekalb Circuit Court; *Emmet A. Bratton*, Judge.

Action by Theodore A. Smith and another against the Vandalia Railroad Company. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Anderson, Parker & Crabill, *J. G. Williams* and *J. E. & J. H. Rose*, for appellant.

Willis Rhoads, for appellees.

WATSON, J.—This is a companion case to *Vandalia R. Co. v. Blum* (1910), *ante*. 697. The facts in this case warrant the conclusion reached by the trial court.

Judgment affirmed with ten per cent penalty.

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[NOTE.—The citation *Castle v. Clark*, 192, 196 (6), indicates that the case begins on page 192, that the point cited is on page 196, and that such point is numbered 6 in the margin.—REPORTER.]

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I. APPELLATE JURISDICTION.

From alley assessment must be taken within twenty days, see MUNICIPAL CORPORATIONS, 18; *City of Logansport v. Webster*, 499, 501 (2).

1. *Transfer to Appellate Court.—Presumptions.*—Where the Supreme Court transfers an appeal to the Appellate Court, it may be presumed that such appeal should have been taken to the Appellate Court in the first instance. *Wirrick v. Boyles*, 698, 699 (1).
2. *Jurisdiction.—Raising Question of.*—The Appellate Court can determine its jurisdiction over the subject-matter of an appeal, though the question is not raised by the parties.
City of Crawfordsville v. Brown, 592, 594 (3).

II. DECISIONS REVIEWABLE.

As to finality of judgments, see JUDGMENT.

3. *Special Proceedings.—Street Assessments.*—No appeal lies from a street assessment, unless the statute expressly authorizes it.
City of Crawfordsville v. Brown, 592, 593, (1).
4. *Street Assessments.—Statutes.*—Under §8716 Burns 1908, Acts 1905, p. 219, §111, providing that the report of the appraisers shall be final and conclusive, no appeal lies from a judgment of the circuit court fixing the street assessment in accord with the report of the appraisers appointed by the court to make a reassessment.
City of Crawfordsville v. Brown, 592, 594 (2).
5. *Final Judgment.—Denial of Right to File Interreving Petition.—Corporations.—Stockholders.*—A judgment denying to stockholders in a corporation the right to intervene in a suit for the appointment of a receiver, and refusing them permission to file an answer or cross-complaint in the suit, is final and appealable.
Thayer v. Kinder, 111, 113 (2).

III. RIGHT OF REVIEW.

6. *From Boards of Commissioners.—“Aggrieved” Persons.—Taxpayers.*—A resident, citizen, and taxpayer of a county is entitled to appeal as an “aggrieved” person, under §6021 Burns 1908, §5772 R. S. 1881, giving such person a right of appeal from an allowance by the board of commissioners.
Workman v. Bent, 75.

APPEAL—Continued.

IV. PRESENTATION OF GROUNDS FOR REVIEW.

Against judgment for alimony payable in instalments, must be based on motion to modify judgment, see *DIVORCE*, 5; *Boggs v. Boggs*, 397, 400 (5).

Theory of complaint cannot be changed on, see *PLEADING*, 8; *Indiana, etc., Oil Co. v. Stewart*, 554, 556 (1).

Objections to the admission of evidence cannot be changed on appeal, see *TRIAL*, 1; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 246 (17).

7. *Record.—Complaint.—Paragraphs.—Failure to Present.—Rulings* upon the first paragraph of a complaint will not be reviewed, on appeal, where the transcript fails to show the filing thereof, and where such paragraph cannot be separated from the second. *Castle v. Clark*, 192, 193 (1).

8. *Erroneous Admission of Evidence.—New Trial.*—The erroneous admission of evidence, where not made a ground for a new trial, is not available on appeal.

New Long Distance Tel. Co. v. White, 382, 386 (2)

9. *New Trial.—Evidence Not in Record.*—Where the record on appeal does not contain the evidence, a specification in the motion for a new trial that the evidence does not sustain the special findings, cannot be considered. *Roberts v. Dimmett*, 566, 569 (2).

10. *Omission of Evidence from Bills of Exceptions.—New Trial.*—An assignment that the court erred in overruling appellant's motion for a new trial cannot be considered, where the questions depend upon the evidence, and some of the evidence pertaining thereto is affirmatively shown by the bill of exceptions to be omitted.

McGary v. Yeager, 696.

V. PARTIES.

11. *Record.*—Where the record is uncertain and the verdict and judgment were against one defendant alone, another defendant who was made a party to the case at his own request, will not be considered as a party to the appeal.

Holtz v. Gaidry, 415, 418 (2).

VI. REQUISITES FOR TRANSFER OF CAUSE.

12. *Time for Taking.*—An appeal may be taken at any time within one year from the rendition of the judgment appealed from; and an appeal is taken at the time of the filing of the transcript with the Clerk of the Supreme Court. *Ragle v. Dedman*, 693, 695 (1).

VII. RECORD AND PROCEEDINGS NOT IN RECORD.

13. *Instructions.—Questioning.*—Where the transcript merely shows the filing of certain instructions, their signature by the judge and by the appellant, but fails to show that such instructions were given at the trial, no reversible error is shown.

Castle v. Clark, 192, 194 (2).

14. *Instructions.—How Made Part of Record.*—Where the word "given," or the word "refused," was written before each of the instructions set out in the transcript, such instructions cannot be considered a part of the record, the statute (§561 Burns 1908,

APPEAL—Continued.

Acts 1907, p. 652) requiring a memorandum showing which instructions were given and which refused, signed by the judge at the close of the instructions.

Fowler v. Fort Wayne, etc., Traction Co., 441, 444 (4).

15. *Making Instructions Part of Record.—Statutes.*—Under §561 Burns 1908, Acts 1907, p. 652, providing that the court shall indicate by a signed memorandum which of the instructions were given, and which were refused, instructions not so designated cannot be considered a part of the record.

Wiseman v. Gouldsberry, 677, 678 (1).

16. *Making Instructions Part of Record.—Statutes.*—Under §561 Burns 1908, Acts 1907, p. 652, §1, instructions given by the judge on his own motion and not signed by him, are not a part of the record on appeal.

Bottorff v. Bottorff, 692 (2).

17. *Instructions.—How Made Part of Record.—Statutes.*—Instructions can be made a part of the record by statute (§561 Burns 1908, Acts 1907, p. 652) only by fulfilling the statutory requirements.

Indianapolis, etc., Transit Co. v. Walsh, 42, 48 (8).

18. *Instructions.—Making Part of Record under Statute.—Requirements.*—Under §561 Burns 1908, Acts 1907, p. 652, instructions, to be a part of the record, must be signed by the party, or his attorney, and a memorandum made and signed by the judge showing those given and those refused, proper exceptions taken, and an order-book entry made of the filing thereof.

Indianapolis, etc., Transit Co. v. Walsh, 42, 49 (9).

19. *Instructions.—Questioning.*—Questions on instructions cannot be raised on appeal, unless such instructions are brought into the record.

Indianapolis, etc., Transit Co. v. Walsh, 42, 49 (10), 50 (10).

20. *Instructions.*—Instructions properly signed by the judge and filed constitute a part of the record.

Indianapolis, etc., Transit Co. v. Walsh, 42, 50 (11).

21. *Special Findings.—Conclusions of Law.—How Made Part of Record.*—Special findings and conclusions of law which were not signed by the judge, and which are not shown by an order-book entry to have been filed, constitute no part of the record.

Cole Carriage Co. v. Hornbeck, 61, 62 (1).

22. *Special Findings.—Signing Nunc pro Tunc.*—An order of the trial judge, made upon a motion setting out the alleged special findings and praying for a signing thereof *nunc pro tunc* by the judge, that "the judge does now sign said special findings," without setting out such special findings, does not properly identify such special findings.

Cole Carriage Co. v. Hornbeck, 61, 63 (2).

23. *Special Findings.—Making Part of Record.—Trial.*—Special findings may be made a part of the record by the judge's signature thereto, by a bill of exceptions, or by an order of the court.

Cole Carriage Co. v. Hornbeck, 61, 64 (3).

24. *Defective Record.—Amendments.—Certiorari.*—The Appellate Court is exceedingly liberal in permitting amendments to transcripts on appeal.

Castle v. Clark, 192, 195 (3).

VIII. ASSIGNMENTS OF ERRORS.

25. *Separate.—Joint Exceptions.*—Separate assignments of errors on the overruling of a separate demurrer to the two paragraphs of complaint, are proper, though the exception taken was joint.

City of Tipton v. Freeman, 76, 78 (1).

APPEAL—Continued.

26. *Joint Complaint*.—A joint assignment, on appeal, that the plaintiff's complaint is insufficient, should be overruled, where the complaint is sufficient as to any of the defendants.
Vancleef v. Britton, 388, 389 (1).

IX. BRIEFS.

27. *Waiver*.—Points not discussed are waived.
Campbell v. Brackett, 293, 294 (1).
Farmers, etc., Ins. Co. v. Hill, 605, 607 (1).
Indianapolis, etc., Traction Co. v. Newby, 540, 543 (3).
Ramage v. Wilson, 599, 603 (1).
28. *Sufficiency*.—A brief, though imperfect, presenting the points to be decided, is sufficient. *Ellison v. Branstrator*, 307, 314 (11).
29. *Rules*.—*Waiver*.—The Appellate Court may, in its discretion, refuse to consider alleged errors not properly presented in the appellant's brief. *Raley v. Evansville Gas, etc., Co.*, 649, 657 (7).
30. *Failure to Comply With Rules*.—*Waiver*.—The question of the failure of appellant to comply with the rules of the Appellate Court in presenting questions in his brief, must be presented at the earliest opportunity; and the filing of a brief on the merits constitutes a waiver of the defect.
Raley v. Evansville Gas, etc., Co., 649, 656 (6).
31. *Presenting Record*.—*Waiver*.—Where appellant questions the answer, he should set it out in his brief, but the appellee's failure to call attention thereto constitutes a waiver, on its part, of the defect.
Raley v. Evansville Gas, etc., Co., 649, 655 (5).
32. *Failure to Set Out Record*.—*Waiver*.—Appellant's failure to set out in words, or substance, the questioned demurrer, constitutes a waiver of any questions thereon.
Wirrick v. Boyles, 698, 700 (2).
33. *Presentation of Questions*.—*Change of Venue*.—Where the record shows that a motion for a change of venue was both sustained and overruled, and the party's brief does not conform to the rules in presenting the question discussed, the Court may disregard such question.
Small v. Indianapolis Mortar, etc., Co., 160, 162 (3).
34. *Want of Evidence*.—Appellant's failure to set out or narrate the evidence in his brief makes it discretionary with the Court, on appeal, to consider the evidence.
Jennings v. Shertz, 120, 131 (10).
35. *Setting Out Excluded Evidence*.—Whether the exclusion of certain evidence at the trial was prejudicial cannot be determined, where the excluded evidence is not set out in appellant's brief.
Indianapolis, etc., R. Co. v. Shea, 608, 611 (3).
36. *Waiver*.—*Instructions*.—Instructions not set out in appellant's brief will not be considered. *Pethtel v. Pethtel*, 664, 672 (11).

X. DISMISSAL

37. *No Question Presented*.—Where no question is presented by an appeal, it will be dismissed.
Cole Carriage Co. v. Hornbeck, 61, 64 (4).

APPEAL—Continued.

XI. REHEARING.

38. *Questions Presentable*.—Questions not presented in the original brief cannot be entertained on a petition for rehearing.
Pittsburgh, etc., R. Co. v. Town of Remington, 561, 565 (4).
Ruley v. Evansville Gas, etc., Co., 649, 657 (8).

XII. REVIEW.

(A) PRESUMPTIONS.

39. *Error*.—The presumption, on appeal, is that the trial court committed no error. *Castle v. Clark*, 192, 195 (4).
 40. *Absence of Evidence*.—*Instructions*.—In the absence of the evidence, the presumption, on appeal, is that instructions refused were not applicable thereto.
Cleveland, etc., R. Co. v. Harvey, 153, 157 (6).

(B) WEIGHT OF EVIDENCE.

- In an appeal from a directed verdict for defendant, sufficiency of complaint, not considered, see PLEADING, 23; *Beaning v. South Bend Electric Co.*, 261, 266 (1), 267 (1).
 Verdict sustained by some evidence that railroad company's agent had authority to employ physician, will not be set aside, see RAILROADS, 19; *Southern R. Co. v. Hazelwood*, 478, 483 (3).
 Directed verdict for two joint defendants in an action for negligence will be reversed, where there is evidence tending to support a judgment for either, see TRIAL, 4; *Beaning v. South Bend Electric Co.*, 261, 268 (4).
 Directed verdict improper, where there is some evidence supporting verdict for appellant, see TRIAL, 5; *Saylor v. Obendorf*, 439, 438 (1).
 41. *Weighting Evidence*.—The Appellate Court cannot weigh conflicting evidence.
Boyce v. Holloway, 535, 539 (4).
Doering v. Davenport, 465, 466 (1).
Klein v. Ninde, 672, 673 (2).
Wiseman v. Gouldsberry, 677, 678 (2), 679 (2).
 42. *Affirmance*.—*Evidence*.—A decision supported upon each essential fact by some evidence will be affirmed on appeal.
City of Tipton v. Freeman, 76, 79 (5).
Doering v. Davenport, 465, 467 (2).
Klein v. Ninde, 672, 674 (3).
Poetker v. Tindle, 455, 456 (1).
 43. *Weighting Evidence*.—On appeal the evidence most favorable to appellee, though contradicted, will be considered as true.
Biggs v. School City of Mount Vernon, 572, 574 (1).
Hill v. Hill, 99, 101 (3).
Pittsburgh, etc., R. Co. v. Wood, 1, 12 (13).
 44. *Want of Evidence*.—Where there is a total want of evidence to support a material allegation of the plaintiff's complaint, a judgment in his favor will be reversed.
Cleveland, etc., R. Co. v. Moore, 58, 61 (7).
 45. *Weighting Evidence*.—*Accounts*.—The Appellate Court cannot weigh conflicting evidence in an action on an account.
Castle v. Clark, 192, 196 (6).
 46. *Weighting Evidence*.—*Breach of Contract*.—*Rescission*.—*Agency*.—*Ratification*.—Where a manufacturer of buggies con-

APPEAL—Continued.

tracted to sell and deliver to retailers a certain number of buggies, retaining the right to take possession of such buggies if such manufacturer felt insecure, and the buggies were shipped and the evidence was conflicting as to the manufacturer's retention of the goods, his sales agent later taking possession of such goods, and the manufacturer ever afterwards holding such possession and not offering to return or deliver such buggies to such retailers, a verdict for such retailers, in an action for breach of contract, will be upheld on appeal. *Cole Carriage Co. v. Hacker*, 368.

47. *Weighting Evidence.—Contracts.—Bonds.*—In an action against a city contractor and the sureties on his bond, evidence that the plaintiff performed services for such contractor and also certain extra work, for which he had not been paid, is sufficient, on appeal, to support a verdict and judgment against such contractor, though the bond itself was not introduced in evidence.

Wilson v. Record, 371, 374 (2).

48. *Weighting Evidence.—Contracts.—Core Drilling.*—Where the defendant company hired the plaintiff to do certain core drilling at certain prices, and there was some evidence that, under defendant's direction, and without defendant's objection, he performed the work, defendant cannot escape payment therefor on the ground that the method of doing the work was somewhat changed.

A. J. Yarger Co. v. Buttz, 659.

49. *Weighting Evidence.—Parties.—Examination of, Before Trial.*—A judgment for defendant will not be disturbed on appeal because his evidence at the trial was inconsistent with his testimony on his examination before trial.

Boos v. Sigmund, 284, 285 (3).

50. *Weighting Evidence.—Fraudulent Conveyances.—Insolvency.*—The Appellate Court will not weigh conflicting evidence as to whether a defendant was solvent at the time of his alleged fraudulent conveyance of his property.

Palde v. Pate, 146.

51. *Weighting Evidence.—Breach of Warranty.—Waiver.—Vendor and Purchaser.*—Whether a purchaser waived his right of action against his vendor for a breach of warranty by assisting such vendor to become guardian of his children and, through such guardian, receiving an ineffective conveyance of their shares, is a question for the trial court, whose judgment upon the weight of the evidence is conclusive on appeal.

Underwood v. Deckard, 663.

(C) **HARMLESS ERROR.**

Overruling motion to separate causes, not reversible, see **PLEADING**, 22; *Pittsburgh, etc., R. Co., v. Wood*, 1, 9 (6).

Imperfect instructions, where not misleading, not reversible, see **TRIAL**, 17.

52. *Affirmance.—Right Result.*—A judgment which is right upon the evidence, will be affirmed.

Smail v. Indianapolis Mortar, etc., Co., 160, 162 (2).

Vandalia R. Co. v. Muhn, 703, 704 (3).

53. *Defective Pleadings.—Evidence Not in Record.—Right Result.*—Where the pleadings alone are in the record, the Appellate Court is unable to tell whether a correct result was reached.

Wulschner-Stewart Music Co. v. Helfft, 428, 429 (3).

APPEAL—Continued.

54. *Admission of Evidence.*—The admission of evidence designed to show the line of defendant's railroad, which does not prejudice defendant's rights, is harmless.

Vandalia R. Co. v. Miller, 366, 369 (3).

55. *Exclusion of Evidence.—Directing Verdict.*—Where upon the undisputed facts the plaintiffs are not entitled to recover, alleged errors in excluding evidence and in directing a verdict for defendant will be considered harmless.

Finley v. City of Kendallville, 430, 434 (2).

56. *Demurrer to Evidence.—Rulings on Sufficiency of Answer.—Briefs.—Waiver.*—Where defendant demurred to the evidence, alleged errors in overruling plaintiff's demurrer to paragraphs of answer will be considered harmless; and such alleged errors are waived by a failure to discuss them.

Plaskett v. Benton-Warren, etc., Soc., 358, 360 (2).

57. *Instructions.—Exceptions.*—Where no exception is taken to the giving of an instruction, no question thereon can be raised on appeal.

Indianapolis, etc., Transit Co. v. Walsh, 42, 48 (6).

58. *Erroneous Instructions.—Curing by Interrogatories.*—Erroneous instructions given may be shown to be harmless by the answers to the interrogatories to the jury.

Hill v. Hill, 99, 101 (4).

(D) WAIVER OF ERROR.

59. *Errors Relied Upon.—Waiver.*—Where appellant relies upon errors in the complaint for a reversal, an alleged error in the overruling of the motion for a new trial may be regarded as waived.

City of Cannelton v. Bush, 638, 642 (6).

XIII. DETERMINATION AND DISPOSITION OF CASE.**(A) AFFIRMANCE.**

60. *Technicalities.*—A just judgment will not be reversed on technicalities.

Jennings v. Shertz, 120, 132 (11).

61. *Fair Trial.*—Where appellant has been given a fair trial and no prejudicial error was committed, the judgment will not be reversed.

Pittsburgh, etc., R. Co. v. Rogers, 230, 249 (28).

62. *Evidence Not in Record.*—Where the only question raised on the judgment appealed from requires a consideration of the evidence, and the evidence is not in the record, the judgment will be affirmed.

Peters v. Peters, 644.

63. *Penalty.*—The Appellate Court may, on affirming a judgment, impose a penalty.

Vandalia R. Co. v. Muhn, 703, 704 (4).

Vandalia R. Co. v. Blum, 697, 698 (2).

Spencer v. Smith, 17, 20 (4).

Wilson v. Record, 372, 374 (3).

(B) REVERSAL.

64. *Improper Evidence.—Special Findings.*—Where the special findings show that the judgment appealed from rests upon incompetent evidence, the judgment will be reversed.

Buffalo, etc., Quarries Co. v. Davis, 116, 120 (4).

(C) RENDITION AND FORM OF JUDGMENT.

Remittitur of excessive amount may be ordered on, see **INTEREST**;

Dodge v. Lake Shore, etc., R. Co., 231, 233 (6)

APPEAL—Continued.

65. *Death.—Affirmance.*—Where the appellee died, after appeal taken, a judgment of affirmance will be considered as made on the date of submission of the cause.

Holtz v. Gaidry, 415, 419 (3).

Reichers v. Dammeier, 208, 211 (5).

(D) MANDATE.

Judgment may be ordered for plaintiff on reversal, see **TRESPASS**, 2;
Boyer v. Indianapolis, etc., Traction Co., 683, 687 (3).

66. *When Judgment Ordered.*—The Appellate Court will order a final judgment where justice requires it.

New Long Distance Tel. Co., v. White, 382, 387 (4).

67. *Reversal.—Parties.*—The Appellate Court, where justice requires, may reverse a judgment as to all parties, though some are not requesting such reversal.

Todd v. Mills, 471, 474 (2).

68. *Demurrer to Evidence.—Ordering New Trial.—Discretion.*—Where defendant's demurrer to the evidence was sustained and the plaintiff appeals, the Appellate Court's order should be for the overruling of such demurrer, if the facts warrant, and not for a new trial.

Plaskett v. Benton-Warren, etc., Soc., 358, 365 (6).

APPELLATE COURTS—

See **COURTS**.

ASSAULT AND BATTERY—

1. *Damages.—Self-Defense.—Instructions.*—An instruction that self-defense cannot be carried further than the necessity of the case demands, that "a person exercising such right may safely act upon appearances," and that "the danger must be judged from his standpoint if he entertained an honest belief in its existence," is not prejudicial to defendant.

Reichers v. Dammeier, 208, 210 (3).

2. *Excessive Force.—Instructions.*—An instruction that in repelling an assault the defendant had no right to use excessive force, and if he did, he would be liable for such excess, is not erroneous.

Reichers v. Dammeier, 208, 210 (4).

ASSIGNMENTS OF ERRORS—

See **APPEAL**, 25, 26.

ASSOCIATIONS—

For mutual insurance, see **INSURANCE**.

ASSUMPTION OF RISK—

See **MASTER AND SERVANT**.

ATTORNEY AND CLIENT—

Contract between attorney and guardian, see **GUARDIAN AND WARD**, 2-4; *Hudspeth v. Kitchen*, 524.

1. *Collections.—Liability.*—An attorney is liable to his client upon demand for money collected for such client.

Spencer v. Smith, 17, 19 (1).

ATTORNEY AND CLIENT—Continued.

2. *Collections.—Notice.*—It is the duty of an attorney, within a reasonable time after collecting money for a client, to notify such client of such fact. *Spencer v. Smith*, 17, 19 (2).
3. *Collections.—Recovery of Fees.—Instructions.*—In an action by a client against her attorneys, for the recovery of money collected by them for her, an instruction that the jury should ascertain the amount collected and deduct therefrom a reasonable sum for attorneys' fees, and return a verdict for the remainder with interest, properly protects the interests of the attorneys. *Spencer v. Smith*, 17, 20 (3).
4. *Fees.—Negligence.—Counterclaim.*—In an action for attorneys' fees, a counterclaim for negligence in the conduct of the litigation may be pleaded by the client. *Rooker v. Bruce*, 54, 58 (2).

BAILMENT—

Liability of master for servant's injury of a hired horse, see **MASTER AND SERVANT**, 64; *Reeroth v. Holloway*, 36, 41 (5).

1. *Words and Phrases.—"Necessary."*—The word "necessary" may import indispensably requisite, needful, appropriate, reasonable for the purpose, convenient, useful, suitable, or inevitable, but its true meaning must be determined from the circumstances in which it is used. *Reeroth v. Holloway*, 36, 37 (1).
2. *Words and Phrases.—"Reasonable."*—The word "reasonable" imports appropriate, necessary, ordinary, or usual under the circumstances, and always implies the exercise of good faith and a sound discretion. *Reeroth v. Holloway*, 36, 38 (2).

BANKRUPTCY—

Trustee in, cannot recover value of husband's labor expended on wife's separate estate, see **FRAUD**, 6; *Wascom v. Raben*, 221, 226 (4).

Jurisdiction.—The federal courts have exclusive jurisdiction of proceedings in bankruptcy. *Pittsburgh, etc., R. Co. v. Wood*, 1, 9 (5).

BANKS AND BANKING—

Certificate of deposit given by the owner to a person, to be delivered, at owner's death, to beneficiary, constitutes a trust fund in favor of beneficiary, see **TRUSTS**, 1; *Traylor v. Hollis*, 680, 682 (1).

BASTARDY—

Limitation of action against trustee of bastard child's money runs only after a repudiation of trust, see **TRUSTS**, 3; *Lewis v. Hershey*, 104, 108 (5).

1. *Title to Money Recovered.—Parent and Child.*—The money recovered in a bastardy proceeding belongs to the child and must be used for its benefit. *Lewis v. Hershey*, 104, 106 (1).
2. *Recovery for.—Use of Money.—Trusts.*—Money can be recovered in a bastardy case only for the support of the child, and the mother ordinarily becomes its trustee for the use of the child. *Lewis v. Hershey*, 104, 106 (2).
3. *Recovery for.—Trusts.—Notice.*—One who knowingly borrows money recovered in a bastardy case thereby becomes a trustee of such money, and is liable to such child. *Lewis v. Hershey*, 104, 106 (3).

BASTARDY—Continued.

4. *Recovery.—Rights of Child.*—An illegitimate child, by its next friend, may maintain an action for money recovered for its benefit and improperly used. *Lewis v. Hershey*, 104, 107 (4).
5. *Trusts.—Interest.—Parent and Child.*—One who knowingly borrows money recovered for, and belonging to, a bastard child, and who commingles such money with his own, for his own use, is liable for such money and interest thereon, but where such child was a member of the borrower's family, interest will be computed from the time such child ceased to be a member of the family. *Lewis v. Hershey*, 104, 109 (7).

BENEFICIARIES—

See INSURANCE.

BILLS AND NOTES—

Given for insurance premium, together with policy, constitute contract, see INSURANCE, 1; *Equitable Life Assur. Soc., etc., v. Stough*, 411, 414 (3).

Surrender of policy by assured, and cancelation of premium note, estop the beneficiary, see INSURANCE, 5; *Equitable Life Assur. Soc., etc., v. Stough*, 411, 415 (5).

1. *Consideration.—Want of.—Failure of.—Burden of Proof.—Answer.*—Where the plea to a complaint upon a negotiable note is the want, or failure, of consideration, the burden of showing that the indorsee was not a *bona fide* holder is upon defendant. *Hill v. Ward*, 458, 460 (1).
2. *Defenses.—Notice of, by Indorsee.—Answer.*—An answer, in an action by a second indorsee of a negotiable note, that such indorsee at the time of the indorsement had notice of the alleged defense, is bad for failure to allege that the first indorsee also had notice of such defense. *Hill v. Ward*, 458, 460 (2).
3. *Innocent Purchasers.—Subsequent Indorsees.*—All subsequent indorsees from an innocent purchaser of a negotiable note take it free from all defenses not available against such innocent purchaser. *Hill v. Ward*, 458, 462 (3).
4. *Fraud.—Illegality.—Burden of Proof.*—Where fraud or illegality is pleaded as a defense to an action by an indorsee upon a negotiable note, the burden is upon such indorsee to show that he is a *bona fide* purchaser. *Hill v. Ward*, 458, 464 (4).
5. *Consideration.—Illegality.—Performing Medical Services.—Want of License.*—A note given in payment of certain medical treatment to be rendered by the payee is void, where such payee was not licensed to practice medicine, such practicing without a license constituting a misdemeanor. *Hill v. Ward*, 458, 464 (5).
6. *Negotiability.—Requisite.*—A note to be negotiable under the law merchant, must bear a date, and contain an unconditional promise to pay a certain sum of money at a certain time and place, and any uncertainty in any such requisites destroys such negotiability. *Gilpin v. People's Bank*, 52, 53 (1).
7. *Negotiability.—Designating Consideration.*—The designation of the consideration in a note does not destroy its negotiability. *Gilpin v. People's Bank*, 52, 55 (2).
8. *Negotiability.—Collateral Security.—Mention of.*—A recital in a note that collateral is held as security and an authorization of

BILLS AND NOTES—Continued.

the application of the proceeds to the payment of the note, does not destroy the negotiability of the note.

Gilpin v. People's Bank, 52, 55 (3).

9. *Negotiability.—Recitals.*—Recitals in a note of the consideration therefor, that the title to the goods for which the note was given does not pass until payment of the note, and that in default of payment the payee shall sell the goods and apply the proceeds to the payment of the note, do not destroy its negotiability.

Gilpin v. People's Bank, 52, 56 (4).

10. *Negotiability.—Uncertainty in Amount.*—A note containing a provision that all partial payments made thereon, until final payment, shall be taken and considered as rental for the property sold, destroys the negotiability of such note.

Gilpin v. People's Bank, 52, 56 (5).

11. *Evidence.—Questions for Jury.*—Whether the maker of a note deposited it in bank to cover a possible overdraft, and whether he received credit therefor as a deposit, are questions for the court or jury trying the case.

Poetker v. Tindle, 455, 456 (2).

BILLS OF EXCEPTIONS—

See APPEAL.

BILLS OF LADING—

See CARRIERS.

BILLS OF PARTICULARS—

In complaint for money expended, see WORK AND LABOR; *Wulschener-Stewart Music Co. v. Helft*, 428 (1).

BOARDS OF COMMISSIONERS—

Appeals from, see APPEAL, 6.

Duty of, as to gravel roads, see HIGHWAYS.

BONDS—

Cost of execution of guardian's bond, not a charge upon the ward's estate, see GUARDIAN AND WARD, 3; *Hudspeth v. Kitchen*, 524, 529 (3).

Bondsmen not liable for debts contracted prior to execution of, see SURETYSHIP AND GUARANTY; *Baker v. American Tool Co.*, 619, 621 (3).

BOUNDARIES—

Location.—Special Findings.—Special findings that a purchaser "supposed the fence was on the line" and that such purchaser intended to claim such fence adversely to the adjoining proprietor, do not show that such fence was the boundary line.

Mayer v. C. P. Lesh Paper Co., 250, 253 (3).

BRIDGES—

Cities liable for negligence in maintaining, see NEGLIGENCE, 12; *City of Fort Wayne v. Merriman*, 286, 289 (3).

BRIEFS—

See APPEAL, 27-36.

BROKERS—

Complaint for commissions, see **WORK AND LABOR**; *Wulschner-Stewart Music Co. v. Helft*, 428 (1).

1. *Compensation.—Agency.—Sales.*—A broker who has property for sale or exchange, and who brings the owner of the property and the purchaser together, an exchange or sale being effected, is entitled to his commission. *Shelton v. Lundin*, 172, 176 (1).
2. *Contracts.—Change of.—Commission.*—Where an owner specified, to his broker, certain terms of sale for his property, his subsequent change thereof on making a sale to the purchaser procured by such broker, cannot deprive such broker of his commission. *Shelton v. Lundin*, 172, 176 (2).
3. *Discharge.—Contracts.—Rescission.*—Where the owner of property employed a broker to effect a sale of property, and the purchaser that he secured entered into a contract of purchase, reserving a right to rescind, and he so rescinded, such rescission did not discharge the broker, nor deprive him of his right to a commission, where such persons three days later effected a sale on substantially the same terms. *Shelton v. Lundin*, 172, 177 (4).

BURDEN OF PROOF—

See **EVIDENCE**.

CANCELATION—

Of policy, see **INSURANCE**. 4; *Equitable Life Assur. Soc., etc., v. Stough*, 411, 415 (4).

CARRIERS.

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| <p>I. CARRIAGE OF GOODS,
 (a) BILLS OF LADING, 1, 2.
 (b) TRANSPORTATION AND DELIVERY, 3, 4.
 (c) DELAY IN TRANSPORTATION, 5-7.
 (d) CONNECTING CARRIERS, 8.</p> | <p>(e) CHARGES AND LIENS, 9.
 (f) DISCRIMINATION, 10-13.
 <p>II. CARRIAGE OF PASSENGERS,
 (a) PERFORMANCE OF CONTRACT OF TRANSPORTATION, 14-19.
 (b) PERSONAL INJURIES, 20-44.</p> </p> |
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See **DAMAGES**; **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROADS**.

Shipper whose freight is refused transportation must minimize damages, and his expense therein is chargeable to carrier, see **DAMAGES**, 4; *Pittsburgh, etc., R. Co. v. Wood*, 1, 13 (17).

Breach of contract of, jurisdiction ordinarily in state courts, see **COURTS**, 2; *Pittsburgh, etc., R. Co., v. Wood*, 1, 7 (2).

I. CARRIAGE OF GOODS.

(A) BILLS OF LADING.

1. *Railroads.—Complaint.—Conclusions.*—An allegation that defendant railroad company held itself out as a carrier of goods between certain points is one of fact, and not a mere conclusion. *Pittsburgh, etc., R. Co. v. Wood*, 1, 10 (8).
2. *Railroads.—Issuance of Bills of Lading.—Failure to Allege.—Complaint.*—A complaint against a railroad company for failure to furnish cars for the shipment of grain to a certain point beyond its own line, is not bad for failing to allege that such company issued bills of lading to points beyond its own line, there being an allegation that the company held itself out as a carrier to such points. *Pittsburgh, etc., R. Co. v. Wood*, 1, 10 (9).

CARRIERS—Continued.**(B) TRANSPORTATION AND DELIVERY.**

3. *Railroads.—Failure to Provide Cars.—Kinds of.—Complaint.*—A complaint alleging that defendant railroad company was a common carrier of grain between certain points, that the plaintiffs tendered grain for shipment to such points and demanded "suitable cars" therefor, and that defendant refused to furnish them, sufficiently shows the kind of cars demanded.

Pittsburgh, etc., R. Co. v. Wood, 1, 10 (7).

4. *Railroads.—Transporting Freight.—Duty.—Complaint.*—A complaint alleging that defendant railroad company held itself out as a common carrier of grain to certain points, that the plaintiff's demanded cars in which to ship grain to such points, and that they were ready and willing to pay the charges, shows a duty on the part of the company to furnish the cars desired.

Pittsburgh, etc., R. Co. v. Wood, 1, 16 (24).

(C) DELAY IN TRANSPORTATION.

5. *Railroads.—Refusal to Transport Freight.—Tender of Payment of Charges.*—Evidence that the plaintiffs were ready, willing and able to pay freight charges is admissible in an action against a railroad company for failing to transport goods.

Pittsburgh, etc., R. Co. v. Wood, 1, 12 (15).

6. *Railroads.—Refusal to Transport Grain.—Damages.*—Where a railroad company refused to transport the plaintiffs' grain to Baltimore, and by reason thereof they were compelled to transport such grain to another point to preserve it, the damage consists in the difference between the selling price received, after making allowance for the difference in the cost of transportation, and the selling price at Baltimore when it should have arrived there.

Pittsburgh, etc., R. Co. v. Wood, 1, 13 (18).

7. *Railroads.—Failure to Transport.—Instructions.*—An instruction that if defendant railroad company held itself out to transport goods to a certain point it would be liable for its failure to furnish cars to ship to such point, is not erroneous.

Pittsburgh, etc., R. Co. v. Wood, 1, 15 (23).

(D) CONNECTING CARRIERS.

8. *Railroads.—Shipments Beyond Own Lines.—Evidence.*—Evidence that a railroad company held itself out as a carrier of freight to certain points sustains a judgment against it for refusing to furnish cars to use for shipment thereto, though such company's bills of lading, to the plaintiffs' knowledge, limited its liability at a certain intermediate point.

Pittsburgh, etc., R. Co. v. Wood, 1, 11 (12).

(E) CHARGES AND LIENS.

9. *Railroads.—Freight.—Payment of.—Complaint.*—A complaint alleging that the plaintiffs tendered their grain to defendant railroad company for shipment and that they were "willing, ready and able to pay" the freight thereon, is sufficient, since the quantity of grain to be shipped depended on the number and capacity of the cars to be furnished.

Pittsburgh, etc., R. Co. v. Wood, 1, 11 (10).

(F) DISCRIMINATION.

10. *Railroads.—Freight Discriminations.—Complaint.*—A complaint alleging that defendant railroad company "unlawfully, habitually and wilfully discriminated against plaintiffs and their stations" in favor of other cities, sufficiently alleges discrimination.

Pittsburgh, etc., R. Co. v. Wood, 1, 11 (11).

CARRIERS—Continued.

11. *Railroads.—Evidence.*—Evidence that shippers at junction points were furnished with desired cars and that the plaintiffs, at intermediate points, were furnished none, shows a discrimination. *Pittsburgh, etc., R. Co. v. Wood*, 1, 12 (14), 17 (14).
12. *Railroads.—Instructions.—Omissions.—Supplying by Others.*—An instruction failing to state that if it was impossible for defendant railroad company to deliver the grain, the company would not be liable, is not misleading where a subsequent instruction expressly told such jury that under such circumstances the company would not be liable. *Pittsburgh, etc., R. Co. v. Wood*, 1, 14 (20).
13. *Railroads.—Instructions.*—An instruction that discrimination by railroad companies, as to shippers, is unlawful only when the conditions are similar, is not erroneous. *Pittsburgh, etc., R. Co. v. Wood*, 1, 14 (21).

II. CARRIAGE OF PASSENGERS.**(A) PERFORMANCE OF CONTRACT OF TRANSPORTATION.**

14. *Passengers.—Care in Alighting.*—A passenger is required to use ordinary care in alighting from the car. *Terre Haute Traction, etc., Co. v. Payne*, 132, 138 (3).
15. *Tort.—Contract.—Passengers.*—A carrier that fails to carry its passengers safely is liable to such passengers in tort or on contract, at their election. *Rooker v. Bruce*, 57, 58 (1).
16. *Passengers.—Railroads.—Care.*—Railroad companies are required to use the greatest practicable care toward their passengers. *Lake Erie, etc., R. Co. v. Cotton*, 580, 583 (2).
17. *Care Toward Passengers.—Instructions.*—An instruction that while a carrier is not an insurer of the safety of its passengers, nevertheless, it is bound to use the highest practicable care in reference thereto, and is liable for the slightest neglect, is correct. *Terre Haute Traction, etc., Co. v. Payne*, 132, 138 (5).
18. *Passengers.—Interurban Railroads.—Stations.—Presumptions.*—Passengers have the right to assume that when an interurban car stops at a regular passenger station they may safely alight. *Indianapolis, etc., Transit Co. v. Walsh*, 42, 45 (2).
19. *Railroads.—Lighting Stations.—Question for Jury.*—A railroad company which sells round-trip tickets to a small flag station is required to know that there will probably be passengers there, and is, therefore, required to light its platform for a reasonable time before the arrival of its train, the reasonableness of such time being a question for the jury. *Cleveland, etc., R. Co. v. Harvey*, 153, 156 (5).

(B) PERSONAL INJURIES.

20. *Passengers.—Accidental Injuries.*—A carrier is not liable for purely accidental injuries sustained by a passenger. *Indiana Union Traction Co. v. Ohne*, 632, 636 (6).
21. *Passengers.—Injuries.—Wet Rails.*—Interurban railroads are bound to anticipate, and take precautions to avoid, the dangers due to wet tracks and climatic conditions. *Indiana Union Traction Co. v. Ohne*, 632, 636 (7).
22. *Discharge of Passengers.—Stations.*—A carrier that stops its car at an improper stopping place, after announcing the next stopping place as the plaintiff's destination, is under the same

CARRIERS—Continued.

duty of discharging its passengers safely as though such place were the regular station.

Terre Haute Traction, etc., Co. v. Payne, 132, 138 (4).

23. *Railroads.—Passengers.—Stepping Upon Platform of Coach.—Statutes.*—A passenger on a railroad train, who goes upon the platform of a car at the invitation of the brakeman, preparatory to alighting, and who is there injured because of the company's negligence, is not precluded from a recovery by §5316 Burns 1908, §3928 R. S. 1881, prohibiting a recovery, where the passenger went upon the platform in violation of the posted rules of the company.

Lake Erie, etc., R. Co. v. Cotton, 580, 585 (5).

24. *Accidents to Passengers.—Presumptions.—Burden of Proof.*—Carriers are required to remove the presumption of negligence arising from the happening of an accident to a passenger.

Lake Erie, etc., R. Co. v. Cotton, 580, 586 (7).

25. *Railroads.—Stations.—Failure to Light.—Complaint.*—A complaint alleging that defendant railroad company negligently failed to light the platform in front of its station, by reason whereof the plaintiff in attempting to reach the train stumbled against the raised end of such platform, to her injury, states a cause of action.

Cleveland, etc., R. Co. v. Harvey, 153, 154 (1).

26. *Railroads.—Passengers.—Alighting.—Complaint.*—A complaint alleging that the plaintiff was a passenger on defendant railroad company's train, that the brakeman announced plaintiff's destination and opened the door, that the plaintiff arose and walked to the door as the train came to a stop, that the train stopped suddenly, causing plaintiff to catch the door facing to prevent his falling, that the stop caused the door to close, catching plaintiff's hand and inflicting injury, that such injury was caused by the carelessness of defendant in opening the door, in not fastening it securely and in suddenly stopping the train, states a cause of action.

Lake Erie, etc., R. Co. v. Cotton, 580, 581 (1).

27. *Interurban Railroads.—Negligent Starting of Cars.—Complaint.—“At or Near.”*—A complaint by a passenger alleging that defendant interurban railroad company stopped its car “at or near” the plaintiff's destination, that passengers began to alight, that the plaintiff attempted to alight, and that while so doing defendant negligently started the car with a jerk, throwing and injuring her, sufficiently shows that the car had reached the plaintiff's destination and that the plaintiff was justified in attempting to alight.

Terre Haute Traction, etc., Co. v. Payne, 132, 135 (1).

28. *Interurban Railroads.—Sudden Starting.—Complaint.*—A complaint alleging that the defendant interurban railroad company stopped its car at a regular station for passengers, that the plaintiff attempted to alight, and that as she was in the act of alighting the defendant started its car with a sudden jerk, thereby throwing her to the ground, to her damage, states a cause of action, and shows that the car was stopped.

Indianapolis, etc., Transit Co. v. Walsh, 42, 44 (1).

29. *Street Railroads.—Alighting.—Damages.—Instructions.*—An instruction that the plaintiff, a married woman, is entitled to recover for “loss of time, if any,” and “the expense, if any, necessarily incurred on account thereof,” is not harmful to the defendant street railroad company, where there was no evidence introduced either as to loss of time, or expense.

Indianapolis Traction, etc., Co. v. Ulrich, 149, 150 (1).

CARRIERS—Continued.

30. *Street Railroads.—Alighting.—Damages.—Married Women.—Instructions.*—An instruction, in an action for personal injuries by a married woman, that the plaintiff is entitled to recover for "loss of time, if any," and that the jury may consider "how far, if at all, the injury renders her less fit to pursue her calling and business," and her ability to earn wages before and after the alleged injury, while not free from criticism, when considered in connection with other instructions, is not prejudicial.
Indianapolis Traction, etc., Co. v. Ulrick, 149, 152 (2).
31. *Inviting Passengers to Alight.—Stations.—Instructions.*—An instruction that the stopping of a car, after giving the usual signal for the regular stopping place, is an invitation to the passengers to alight, is not erroneous.
Terre Haute Traction, etc., Co. v. Payne, 132, 139 (6).
32. *Passengers.—Alighting.—Instructions.*—An instruction stating what acts of defendant's motorman would constitute negligence, and disregarding the element of knowledge, is not bad, since the motorman is presumed to know of the acts of passengers in alighting from the car.
Terre Haute Traction, etc., Co. v. Payne, 132, 141 (9).
33. *Passengers.—Negligent Discharge of.—Instructions.*—An instruction that a passenger is not required to anticipate the carrier's negligence, and that if the conductor stops the car, after having announced the next stopping place as the passenger's destination, the passenger has a right to assume that she may safely alight, and is not bound to apprehend that her safety will be endangered by a sudden start, is correct, the passenger having a right to rely upon the instructions of the conductor.
Terre Haute Traction, etc., Co. v. Payne, 132, 139 (7).
34. *Passengers.—Discharging.—Outlining Facts Authorizing Recovery.—Instructions.*—An instruction setting out the facts authorizing a passenger to recover for injuries sustained in attempting to alight from defendant's car, but omitting to use the word "negligent," is not bad, where it also charges that the recovery is conditioned upon proof of the other allegations of the complaint, one of which was that the defendant negligently started the car with a jerk that caused the injury.
Terre Haute Traction, etc., Co. v. Payne, 132, 140 (8).
35. *Passengers.—Alighting.—Railroads.—Complaint.—Paragraphs.—Instructions.*—Where one paragraph alleged that the plaintiff was injured while standing in the door of defendant railroad company's coach, and another that he was on the platform, the injury in each case being caused by the closing of the door upon his hand, an instruction that the paragraphs were substantially the same is not prejudicial to the company.
Lake Erie, etc., R. Co. v. Cotton, 580, 585 (4).
36. *Acts of Agents.—Injuries to Passengers.—Liability.—Instructions.—Insurers.*—An instruction that a carrier is responsible for the manner in which its servants act in carrying passengers, and if passengers are injured by reason of the wrongful conduct of such servants, such carrier is liable, does not make the carrier an insurer.
Terre Haute Traction, etc., Co. v. Payne, 132, 142 (11).
37. *Evidence.—Hypothetical Questions.—Basis.—Instructions.*—An instruction that if the jury should find that the facts assumed in a hypothetical question are not all proved, such testimony would

CARRIERS—Continued.

be correspondingly weakened, and that if none of such facts were established such evidence might be wholly disregarded, is correct.

Terre Haute Traction, etc., Co. v. Payne, 132, 143 (12).

38. *Passengers.—Injuries to.—Instructions.*—An instruction that a passenger using ordinary care herself, may assume that she will be transported to her destination and be permitted to alight in safety, and that if the carrier should announce that the next stop would be her destination, she might assume, when the car again stopped, that it was the regular station where she might alight without fear of a sudden start, and that if in attempting to alight the car was suddenly started, injuring her, she should recover, "providing, the plaintiff has proved the other material allegations of her complaint by a preponderance of the evidence," is not misleading, where the negligence alleged was that of starting the car before she had alighted.

Terre Haute Traction, etc., Co. v. Payne, 132, 136 (2).

39. *Passengers.—Injuries.—Other Sickness.—Damages.—Instructions.—"Fair Preponderance" of Evidence.—"Satisfaction" of Jury.*—An instruction that no damages should be given to a passenger on account of sickness subsequent to injuries received, where the sickness was not caused by the injuries, and that if the plaintiff has proved the allegations of her complaint "to the jury's satisfaction" by a "fair preponderance" of the evidence, she is entitled to recover, is not unfavorable to the defendant.

Terre Haute Traction, etc., Co. v. Payne, 132, 141 (10).

40. *Passengers.—Injuries Exciting Predisposition to Disease.—Instructions.*—An instruction that if the plaintiff's predisposition to disease was developed exclusively by injuries negligently inflicted by defendant interurban railroad company, while she was a passenger upon defendant's car, she is entitled to recover, is not harmful.

Indiana Union Traction Co. v. Ohne, 632, 635 (3).

41. *Passengers.—Contributory Negligence.—Instructions.—Jury.*—An instruction that if the plaintiff received any of her alleged injuries by reason of the collision of two of defendant interurban railroad company's cars, while she was a passenger, and that if, at the time of the collision, she were seated and had nothing to do with causing the collision, she would not be guilty of contributory negligence, is not an invasion of the province of the jury, nor was it prejudicial to defendant.

Indiana Union Traction Co. v. Ohne, 632, 634 (1).

42. *Railroads.—Lighting Platform.—Verdict.—Interrogatories.—Conflict.*—Where the complaint alleged that the raised end of defendant railroad company's platform was "wholly unlighted and in total darkness," answers to interrogatories that the depot was lighted with four lamps which "threw a profuse light out the windows," are not in irreconcilable conflict with a general verdict for the plaintiff.

Cleveland, etc., R. Co. v. Harvey, 153, 156 (4).

43. *Passengers.—Alighting.—Railroads.—Negligence.—Contributory.—Question for Jury.*—Whether a passenger is contributorily negligent in alighting from a train, and whether the railroad company was negligent in inviting him to alight, are questions for the jury.

Lake Erie, etc., R. Co. v. Cotton, 580, 585 (3).

44. *Passengers.—Injuries.—Aggravation of, by Passengers.—Contributory Negligence.*—The subsequent aggravation of an injury received by a passenger because of the carrier's negligence does not constitute contributory negligence.

Indiana Union Traction Co. v. Ohne, 632, 634 (2).

CASES—

For cases cited, see p. vii.

DISTINGUISHED:

Corry v. Springer, 138 Ind. 506, see *Clore v. Smith*, 340, 343 (3).

Wood v. Robertson, 113 Ind. 323, see *Clore v. Smith*, 340, 343 (3).

EXPLAINED:

Cooper v. Ham, 49 Ind. 393, see *Wasem v. Raben*, 221, 226 (1).

FOLLOWED:

Bailey v. Miller, 45 Ind. App. 475, see *Bailey v. Wilson*, 571.

OVERRULED:

Haskell v. Gallagher, 20 Ind. App. 224, see *Niagara Oil Co. v. McCabe*, 576, 579 (1).

CERTIORARI—

For amending transcript, see **APPEAL**, 24; *Castle v. Clark*, 192, 195 (3).

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Where record shows motion for, was both sustained and overruled. question is not presented. see **APPEAL**, 33; *Smail v. Indianapolis Mortar, etc., Co.*, 160, 162 (3).

CHARACTER—

Of household, as showing value of wife's services, see **EVIDENCE**, 3; *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401, 405 (3).

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See **MINES AND MINERALS**.

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See **PLEADING**.

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See **WILLS**.

COLLATERAL ATTACK—

See **JUDGMENT**.

COMMERCE—

Unfair Trade.—Deccit.—No person has the right to represent his goods as those of another.

Computing Cheese Cutter Co. v. Dunn, 20, 23 (1).

COMMISSIONS—

See **BROKERS**.

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CONTRACTS.**I. REQUISITES AND VALIDITY.**

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- (b) PARTIES, PROPOSALS AND ACCEPTANCE, 5-9.
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Change of terms of, by principal, does not deprive broker of right to commission, see BROKERS, 2; *Shelton v. Lundin*, 172, 176 (2).

Oral evidence varying written, see EVIDENCE, 20; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (5).

By guardian with attorney, see GUARDIAN AND WARD, 2-4; *Hudspeth v. Kitchen*, 524.

Of wife, see HUSBAND AND WIFE, 1, 2; *Elliott v. Atkinson*, 230.

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For services, between parent and child, see PARENT AND CHILD.

To teach, see SCHOOLS, 1, 2; *Biggs v. School City of Mount Vernon*, 572, 575 (2).

In writing, cannot be varied by parol testimony, see VENDOR AND PURCHASER, 13; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (3).

Complaint to construe will as agreed upon, founded upon theory of contract, see WILLS, 19; *Coulter v. Crawfordsville Trust Co.*, 61, 68 (5).

CONTRACTS—Continued.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

1. "*Guarantee*."—The word "guarantee" ordinarily imports an undertaking by one person that another will perform some engagement, but may mean an assurance or an act of making certain. *Bailey v. Miller*, 475, 476 (1).
2. "*Right*."—A "right" is a claim enforceable by law; and, as applied to property, imports the privilege of free use, enjoyment and disposal thereof. *Bailey v. Miller*, 475, 477 (3).
3. *Letters*.—*Statute of Frauds*.—A written contract within the statute of frauds (§7469 Burns 1908, §4910 R. S. 1881) may be made up of letters or telegrams, but a meeting of the minds must be shown. *Jennings v. Shertz*, 120, 125 (1).
4. *Statute of Frauds*.—*Part Payment*.—*Partial Delivery*.—*Evidence*.—Where the evidence shows that the defendant company contracted orally for a quantity of onions for the price of over \$50, and a part of the onions were delivered, the remainder being sacked at the company's request, and a payment made upon them, a verdict for the plaintiffs for the remainder due is supported, such contract being taken out of the statute of frauds by such partial delivery and partial payment (§7469 Burns 1908, §4910 R. S. 1881). *S. Bash & Co. v. Sible*, 408.

(B) PARTIES, PROPOSALS AND ACCEPTANCE.

5. *Letters*.—*Acceptance*.—A letter from defendant stating that he has booked an order from plaintiffs for a certain number of staves of certain dimensions, to be shipped in a certain manner, and specifying the method of payment, and an answer from the plaintiffs stating that they note the defendant's acceptance of the proposal for certain staves, and the method of shipment, and stating that they would load one car the next day, the defendant replying with directions of shipment, constitute a written contract, all of the letters being construed together. *Jennings v. Shertz*, 120, 125 (2).
6. *Sales*.—*Acceptance*.—*Fraud*.—A contract requiring the vendor to furnish to the purchaser machinery of a certain kind "to the acceptance of" such purchaser, ordinarily makes the decision of such purchaser final, except in case of fraud. *Holtz v. Gaidry*, 415, 416 (1).
7. "*Royalty*."—*Gas and Oil*.—The word "royalty," as used in gas and oil contracts, ordinarily imports a share of the product or profit reserved by the owner for permitting another to use the property. *Indiana, etc., Oil Co. v. Stewart*, 554, 560 (8).
8. *Covenants*.—*Gas and Oil*.—*Lease*.—A contract for the sinking of gas and oil wells is not strictly a "lease," as that word is ordinarily used. *Stahl v. Illinois Oil Co.*, 211, 213 (1).
9. *Sale of Patent Right*.—*"Guarantee" of Right*.—A contract in which the holder of a patent right for a state stipulates that he will "guarantee to [the purchaser of a county right] peaceable possession of the rights to said patents and inventions in said * * * county, and all the expenses which may be incurred for suits or infringements or for ousting or keeping out present contractors within said territory," constitutes an undertaking to give possession of such rights and to pay expenses incurred, but not to give possession for such county; and such vendor is not

CONTRACTS—Continued.

liable for sales made by another in such county unless the vendor has incurred expenses because thereof.

Bailey v. Miller, 475, 476 (2), 477 (2).

(C) CONSIDERATION.

10. *Gas and Oil.—Royalties.—Penalties.*—The real consideration for a contract giving to the owner of land a royalty in the oil and gas produced therefrom and a monthly rental for delay in the completion of wells, is the royalty, the rentals for delay being incidental.

Stahl v. Illinois Oil Co., 211, 214 (5).

11. *Uncertain.—Assumption of Payment of Debts.—Sales.—Maxims.*—A contract stipulating that the purchaser of a stock of goods assumes and agrees "to pay the outstanding bills for said place," is not void for uncertainty, the maxim, "That is certain which can be rendered certain" applying thereto.

Boyce v. Royal Stove, etc., Co., 469 (1).

12. *Assumption of Payment of Debts.—Judgment.*—The purchasers of a stock of goods, assuming and agreeing to pay the debts due from the owner thereof, cannot be held liable where, in an action against such owner and such purchasers for one of such debts the judgment was in favor of such owner and against such purchasers.

Boyce v. Royal Stove, etc., Co. 469, 471 (3).

13. *Preamble.—Sales.*—A contract reciting in its introduction that "Whereas it is the desire of said [vendor] to exchange his equity in a stock of goods and store to said [vendees] for said two respective pieces of real estate," and further providing that the vendees shall pay the outstanding debts due for such goods, does not show that the provision for the assumption of the debts is void for the want of a consideration.

Boyce v. Royal Stove, etc., Co., 469, 470 (2).

(D) VALIDITY OF ASSENT.

14. *Statute of Frauds.—Railroads.—Employment of Surgeon.*—A railroad company's contract of employment of a surgeon is not within the statute of frauds, because (1) it is the company's debt, and (2) if not the company's debt, it is a promise, founded upon a sufficient consideration, to pay another's debt, the original debtor not being discharged.

Southern R. Co. v. Hazelwood, 478, 481 (4)

II. CONSTRUCTION AND OPERATION.**(A) GENERAL RULES OF CONSTRUCTION.**

15. *Parts.*—Contracts, where possible, will be construed so as to give effect to all parts thereof.

Indiana, etc., Oil Co. v. Stewart, 554, 558 (5).

16. *Gas and Oil.*—A gas and oil contract providing in clause one that a well shall be sunk within twelve months, or there shall be paid "a yearly rental of \$30 in advance until said well is drilled," and in clause three, that "should gas be found, second party agrees to pay to first party \$100 yearly" for each used well, and in clause four, that free gas shall be furnished to the owner, "or in lieu thereof, the sum of \$20 yearly in advance," and in clause seven, that "a well shall be drilled within two years from this date, or the royalty paid to first party," gives the royalty under clause three only when a well is used, gives the royalty of \$100 yearly, when no well is sunk within two years, and gives the rental of \$30 under clause one until a well is sunk, after which

CONTRACTS—Continued.

clause one is superseded by clause four, giving free gas, or the rental of \$20, yearly.

Indiana, etc., Oil Co. v. Stewart, 554, 557 (4), 558 (4), 561 (4).

17. *Ambiguities*.—Where a contract is ambiguous, the circumstances will all be considered as well as the construction placed thereon by the parties themselves, in determining the true meaning thereof. *Indiana, etc., Oil Co. v. Stewart*, 554, 559 (7).

18. *Gas and Oil*.—In construing contracts for the sinking of oil and gas wells the courts will reject contradictory provisions and determine the true meaning thereof from the general scope and intent of the contract. *Stahl v. Illinois Oil Co.*, 211, 213 (2).

19. *Conduct of Parties*.—In determining the meaning of a contract the courts may consider the acts of the parties thereunder.

Stahl v. Illinois Oil Co., 211, 214 (3).

20. *Severable*.—A contract for fifteen loads of staves to be shipped at separate times is severable. *Jennings v. Shertz*, 120, 131 (9).

21. *Construction by Parties—Estoppel*.—Parties to a written instrument who have placed a construction thereon and have parted with valuable rights upon the faith of such construction, are estopped to deny such construction.

Coulter v. Crawfordsville Trust Co., 64, 68 (4).

(B) CONDITIONS.

22. *Gas and Oil*.—The object of a contract for the sinking of oil and gas wells is to explore the land for oil and gas, and to develop the production thereof. *Ramage v. Wilson*, 599, 603 (2).

23. *Options—Gas and Oil*.—Under a contract providing that the contractor shall "drill an additional well each sixty days, or pay \$1 per day for each and every day's delay over that time until three wells are drilled," and that the contractor "shall have the right to * * * cancel or annul this contract or any part thereof at any time," such contractor may not retain the gas and oil, and operate the two wells drilled, and cancel the contract so far as it affects other parts of the real estate, or requires the sinking of a third well. *Ramage v. Wilson*, 599, 603, (3) 604 (3).

24. *Oil and Gas—Real Property—Vested Interests*.—A contractor who sinks oil or gas wells under a contract giving to him a part of the gas or oil discovered, upon the discovery and development thereof, acquires a vested interest therein.

Ramage v. Wilson, 599, 604 (4).

25. *Operation of*.—"Within One Day from this Date."—The words "within one day from this date," as used in a gas and oil contract providing that the landowner should have gas, "free of cost, within one day from this date, or in lieu thereof, the sum of \$20, yearly, in advance," refer to the date of the completion of a well, and not to the date of the contract.

Indiana, etc., Oil Co. v. Stewart, 554, 559 (6).

26. *Oil and Gas—Royalties—Rentals*.—A contract giving to the owner of a seventy-acre tract of land a royalty of one-sixth of all the gas and oil produced therefrom, and providing that "each location shall consist of ten acres, more or less, and each well shall be due in sixty days from the completion of the last one," that no well shall occupy more than one acre, and that "each well shall be due in sixty days from the completion of the last

CONTRACTS—Continued.

one, or a monthly rental of \$5 [shall be paid] for each well due" may be construed to give such rental for delay only in case of the first seven wells. *Stahl v. Illinois Oil Co.*, 211, 215 (6).

III. PERFORMANCE OR BREACH.

27. *Manufacturing and Shipping Goods.—Failure to Give Directions.—Agency.*—A person contracting with a manufacturing company for the manufacture and shipment of certain goods cannot by withholding shipping directions abrogate his contract, such company being merely his bailee or agent in the shipping of the goods. *Jennings v. Shertz*, 120, 129 (6).
28. *Manufacture and Shipment of Goods.—Delay in Shipping.—Estoppel.*—One who orders, in writing, certain goods to be manufactured and shipped at a certain time, is estopped to take advantage of a delay in shipment, where by a written order he has requested such delay. *Jennings v. Shertz*, 120, 130 (7).
29. *Support.—Failure to Conform.—Damages.*—Where the plaintiff's decedent conveyed her farm to her son, such son agreeing to furnish, for her, firewood, vegetables, apples and cider, and the evidence, in an action by her administrator for damages, fails to show that any vegetables or apples were raised on the farm thereafter, or that any cider was made, and further shows that such son furnished some of the wood used by the grantor, and agreed with the person who furnished the remainder to pay for it, no breach of the contract is shown. *Saylor v. Obendorf*, 436, 439 (2).

IV. ACTIONS FOR BREACH.

30. *Gas and Oil.—Breach.—Election.—Complaint.*—A complaint for rentals under a contract providing that the plaintiff "shall have, free of expense, gas, * * * to light and heat the dwellings on the premises, * * * free of cost, within one day from this date, or in lieu thereof, the sum of \$20 yearly in advance," need not allege that the leased premises had dwellings thereon, the contract giving to the plaintiff an option to take either the gas or the rental. *Indiana, etc., Oil Co. v. Stewart*, 554, 556 (2), 560 (2).
31. *Gas and Oil.—Breach.—Complaint.*—A complaint for rentals under a gas and oil contract for the year ending February 12, 1906, alleged to have been demanded under a contract executed February 13, 1899, the contract providing that "a well shall be drilled within two years from this date, or the royalty [\$100 annually] paid to first party," is sufficient, where it shows that no well has been sunk, the date of the contract showing that the first two years have expired. *Indiana, etc., Oil Co. v. Stewart*, 554, 557 (3).
32. *Breach.—Complaint.*—A complaint by a sub-contractor alleging that defendant contractor employed him to perform certain work, that he performed it, and that, at defendant's request, he performed certain extra work, and that for such service a certain sum was due and unpaid, is sufficient when attacked for the first time on appeal, such complaint being sufficient to bar another action for the same cause. *Wilson v. Record*, 371, 373 (1).
33. *Performance.—Breach.—Conditions Precedent.—Refusal to Perform.—Complaint.*—A complaint alleging that the plaintiffs

CONTRACTS—Continued.

and defendant executed a contract, that the plaintiffs performed a part of such contract, and were prevented from performing the remainder thereof by the defendant, sufficiently alleges the performance of a condition precedent.

Jennings v. Shertz, 120, 126 (3)

34. *Refusal to Perform.—Complaint for Breach.*—A complaint alleging that defendant repudiated and refused to perform the contract sued upon, need not show a performance, or offer to perform, by the plaintiffs.

Jennings v. Shertz, 120, 127 (4).

35. *Breach.—Manufacturing Staves.—Complaint.*—A complaint alleging that defendant contracted with the plaintiffs for them to manufacture certain staves for the defendant, that they did so, but that they failed to load them on the cars, as provided by the contract, because the defendant withheld shipping directions, shows an executed contract on the part of the plaintiffs.

Jennings v. Shertz, 120, 129 (5), 130 (5).

36. *Executed.—Executory.—Complaint.—Demurrer.*—A demurrer for want of facts does not raise the question of repugnancy in a complaint for breach of contract, some of the paragraphs alleging an executory, and some an executed, contract.

Jennings v. Shertz, 120, 131 (8).

37. *Sales.—Fraud.—Special Findings.*—Special findings that defendant falsely represented to the plaintiff that a certain Persian lamb fur jacket was manufactured from first-class skins, when, in fact, it was made from damaged skins, that the plaintiff was induced by such false representation to pay for the jacket, and that "defendant was guilty of fraud in making said sale," sufficiently show that the contract was fraudulent as against the plaintiff.

Klein v. Ninde, 672, 673 (1).

38. *Breach.—Special Findings.—Evidentiary Facts.*—Where a contract for the exchange of properties provided that if one of the parties was unable to name a purchaser for certain property conveyed, then the contract should be "void and of no effect," a special finding merely showing that the party to the exchange who was to find a purchaser for said property informed such other party that he could not find a purchaser for the land involved in the trade, will be disregarded as evidentiary, especially where it is further shown that three days later the same parties closed the contemplated trade.

Shelton v. Lundin, 172, 177 (3).

CONTRIBUTION—

1. *Foreclosure.—Complaint.*—"Junior."—"Inferior."—A complaint for contribution alleging that defendant's claims are "junior" to those of plaintiff sufficiently shows that such claims are "inferior" to those of plaintiff. *Ellison v. Branstrator*, 307, 310 (1).
2. *Demand.—Redemption.—Complaint.*—A complaint by the personal representative of a redemptioner of four parcels of land sold in a body at sheriff's sale, such redemptioner owning only two of such parcels, need not allege a demand for contribution, the statute (§812 Burns 1908, §769 R. S. 1881), giving the redemptioner a lien therefor. *Ellison v. Branstrator*, 307, 310 (2).
3. *Sheriff's Sales.—Tax Sales.—Cross-Complaints.—Striking Out.*—In a suit for contribution by the representative of a redemptioner from sheriff's sale of several parcels of land sold in a body, some of which parcels were owned by such redemptioner, and some by

CONTRIBUTION—Continued.

others, the complaint alleging that defendants were asserting claims to such redeemed parcels, and that their claims were inferior to those of such redemptioner, a cross-complaint alleging that the cross-complainant purchased the parcels in controversy at a tax sale prior to such sheriff's sale and had a tax deed therefor, is germane to the issues, and should not be stricken out on motion.

Ellison v. Branstrator, 307, 313 (7).

CONTRIBUTORY NEGLIGENCE—

See CARRIERS; INTERURBAN RAILROADS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

CONVEYANCES—

See DEEDS.

CORPORATIONS.

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|---------------------------------------|--|
| I. CAPITAL, STOCK AND DIVIDENDS, 1-3. | IV. CORPORATE POWERS AND LIABILITIES, 7-9. |
| II. MEMBERS AND STOCKHOLDERS, 4, 5. | V. INSOLVENCY AND RECEIVERS, 10-12. |
| III. OFFICERS AND AGENTS, 6. | |

See MASTER AND SERVANT.

I. CAPITAL, STOCK AND DIVIDENDS.

1. *Capital Stock.—Subscriptions.—Telephones.*—The statute (§57.00 Burns 1908, §4182 R. S. 1881), providing for the incorporation of telephone companies, does not require that all, or any specific part, of the capital stock shall be subscribed for at the time of incorporation.
Griffith v. Sproul, 504, 509 (1).
2. *Capital Stock.—Sale of.—Debts.—Telephones.—Directors.—Acts of.*—A telephone company with an authorized capital stock of \$25,000, \$15,000 of which has been issued, has the right to issue and sell the remainder of such authorized stock; and the act of a majority of the directors in selling a portion of the unissued stock is the act of the company.
Griffith v. Sproul, 504, 509 (2).
3. *Capital Stock.—Sale of, for Less than Value.—Special Findings.*—In a suit to enjoin the issuing of unissued shares of the authorized capital stock of a corporation, on the ground that such issue and sale were wholly unnecessary, and to set aside a certain sale made after the filing of the suit on the ground that the sale price was far below the value of the stock, a judgment for defendants will be upheld, there being no finding that defendants knew the value of the stock sold, or that they received any profit therefrom, or that any person would pay more than the amount received for such stock.
Griffith v. Sproul, 504, 510 (7).

II. MEMBERS AND STOCKHOLDERS.

Judgment denying stockholders the right to intervene in suit for a receiver, appealable, see APPEAL, 5; *Thayer v. Kinder*, 111, 113 (2).

Three and one-half months delay, not unreasonable, for stockholders to bring suit to set aside receivership for, see LACHES; *Thayer v. Kinder*, 111, 115 (8).

CORPORATIONS—Continued.

4. *Duty of Majority Stockholder to Others.*—A stockholder who owns a majority of the stock in a corporation, occupies a fiduciary relation to the minority stockholders, and must exercise good faith, care and diligence in the control of the company's property.
Griffith v. Sproul, 504, 510 (8).
5. *Parties.—Corporations.—Receivers.*—Stockholders are equally bound by the action of the directors of their corporation, and have equal rights in suits for the appointment of a receiver, and one stockholder has a right to become a party in order to resist the appointment of a receiver where another has petitioned therefor.
Thayer v. Kinder, 111, 114 (5).

III. OFFICERS AND AGENTS.

6. *Removal of.*—Where the by-laws of a corporation give the board of directors power to remove officers of the company, when required by the best interests of the company, in the absence of a finding that such removal was against such interest, the removal by the directors will be upheld, such directors having the power to determine what were the best interests of the company.
(Griffith v. Sproul, 504, 510 (5).)

IV. CORPORATE POWERS AND LIABILITIES.

7. *Directors.—Discretion.*—The directors of a corporation have a discretionary power in the management thereof.
Thayer v. Kinder, 111, 114 (4).
8. *Acts of.—Directors.—Fraud.—Concealment of Purposes.*—The act of a majority of the directors in concealing their purpose from the others to do a lawful thing does not constitute fraud.
Griffith v. Sproul, 504, 510 (3).
9. *Acts of.—Judicial Control of.—Fraud.—Illegality.*—In the absence of fraud or illegality, the courts have no power to determine the reasonableness of the acts of a voluntary association.
Griffith v. Sproul, 504, 510 (6).

V. INSOLVENCY AND RECEIVERS.

10. *Stockholders.*—A stockholder in a corporation which is in imminent danger of insolvency may maintain a suit for the appointment of a receiver thereof. *Thayer v. Kinder*, 111, 112 (1).
11. *Receivers.—Suits for.—Stockholders.*—A suit for the appointment of a receiver is purely equitable, and the property of the corporation, so far as the suit is concerned, is regarded as belonging to the individual stockholders.
Thayer v. Kinder, 111, 114 (6).
12. *Receivers.—Right to Object to Intervening Petition by Stockholders.*—A receiver of a corporation, appointed upon the petition of a stockholder has no right to object to proceedings brought by other stockholders to obtain their rights.
Thayer v. Kinder, 111, 116 (9).

COSTS—

See DIVORCE.

Judgment for. is ordinarily final, see JUDGMENT, 8; *Dodge v. Lake Shore, etc., R. Co.*, 281, 283 (1).

1. *Infants.—Next Friends.*—Next friends are liable for the costs of actions unsuccessfully prosecuted in their names on behalf of minors.
Dodge v. Lake Shore, etc., R. Co., 281, 283 (2).

COSTS—Continued.

2. *Appeal.—Judgment.*—A judgment of the trial court that decedent be taxed with all costs accruing after a named date includes the cost of a reversal in the Supreme Court after such date.
Dodge v. Lake Shore, etc., R. Co., 281, 283 (3).
3. *Payment.—Defense of.—Appeal.—Reversal.*—The payment of a judgment for costs bars another action therefor, and judgment can be reversed lawfully, on appeal, only for substantial errors.
Dodge v. Lake Shore, etc., R. Co., 281, 283 (5).

COUNTERCLAIM—

See PLEADING; SET-OFF AND COUNTERCLAIM.

For negligence, in action by an attorney for fees, see ATTORNEY AND CLIENT, 4; *Rooker v. Bruce*, 57, 58 (2).

COUNTIES—

See BOARDS OF COMMISSIONERS.

COURTS—

See JUSTICES OF THE PEACE; REMOVAL OF CAUSES.

Rules of, in filing briefs, see APPEAL, 27-36.

Jurisdiction of, in bankruptcy cases, see BANKRUPTCY.

1. *Jurisdiction.—Interstate Commerce.—Breach of Federal Statute.*—The jurisdiction of an action for the breach of a duty imposed by a provision of the interstate commerce law, is in the federal court.
Pittsburgh, etc., R. Co. v. Wood, 1, 7 (1).
2. *Jurisdiction.—Interstate Commerce.—Breach of Shipping Contracts.—Railroads.*—The jurisdiction of an ordinary action for damages for the breach of a contract by a carrier to transport freight to a city in another state, is concurrently in the state and federal courts.
Pittsburgh, etc., R. Co. v. Wood, 1, 7 (2).
3. *Jurisdiction.—Interstate Commerce.—Railroads.—Breach of Common-Law Duty.*—An action against a railroad company for failure to furnish cars for shipment into another state is not founded upon the interstate commerce act, but upon a breach of such company's common-law duty.
Pittsburgh, etc., R. Co. v. Wood, 1, 8 (3).
4. *Clerks.—Duties as to Records.*—The clerk of a court is a public officer who records the proceedings of the court and has custody of its records.
Citizens State Bank v. Read, 158, 160 (3).
5. *Jurisdiction.—Appointment of Receivers.—Corporations.*—Where a stockholder of a corporation petitions for the appointment of a receiver and the corporation answers admitting the allegations and joining in the request for a receiver, the court has jurisdiction to enter a decree for such appointee.
Thayer v. Kinder, 111, 113 (3).
6. *Appellate.—Decisions.—Duty to Set Out Record for Transfer to Supreme Court.*—The Appellate Court is under no duty to set out, in its opinion, the record presenting every point discussed in order that the losing party may present such question to the Supreme Court on a petition to transfer.
Indianapolis, etc., Traction Co. v. Newby, 540, 549 (13).
7. *Appellate.—Decisions.*—The Appellate Court is not required to write an opinion in affirming a case.
Indianapolis, etc., Traction Co. v. Newby, 540, 550 (14).

COURTS—Continued.

8. *Jurisdiction.—Constitutional Question.—Transfer.*—The Appellate Court has no jurisdiction over an appeal involving a constitutional question, and where the Supreme Court transfers to the Appellate Court an appeal involving a statute which has been upheld, it will be conclusively presumed that such question is not involved in the case.

Pittsburgh, etc., R. Co. v. Rogers, 230, 250 (29).

COVENANTS—

See **CONTRACTS**.

In deed, breach of, see **DAMAGES**, 6; *Tennyson v. Fleener*, 50, 51 (2).

Of deed, may be reformed, see **REFORMATION**; *Tennyson v. Fleener*, 50, 51 (1).

1. *Running with Land.—Gas and Oil Contracts.—Rentals.*—Covenants in a gas and oil contract requiring the payment of certain rent and the furnishing of gas for use in the owner's houses, run with the land. *Indiana, etc., Oil Co. v. Ganiard*, 613, 617 (1).
2. *Gas and Oil Contracts.—Rentals.—Gas.*—Agreements in a gas and oil contract to pay to the owner certain rentals until the sinking of a well, and to furnish gas free for his houses, are separate and unconditional, and where no time is fixed within which a well should be completed, such rentals are payable indefinitely until a well is completed. *Indiana, etc., Oil Co. v. Ganiard*, 613, 617 (2).
3. *Gas and Oil Contracts.—Furnishing Gas.—Failure.—Justification by Owner's Act.*—Where a gas and oil contract required the payment of certain rentals and the furnishing of free gas to the landowner, and upon demand the contractor refused to furnish such gas, the contractor is not justified in his refusal to pay the price of such gas by reason of the fact that the landowner brought suit to forfeit such contract by reason of such refusal. *Indiana, etc., Oil Co. v. Ganiard*, 613, 617 (3).
4. *Breach of.—Complaint.—Denial.—Reformation.*—An action for breach of covenant, answered by a general denial, may be wholly defeated by an affirmative pleading praying a reformation of the deed so as to exclude that part of the land about which the contest arose. *Tennyson v. Fleener*, 50, 51 (3).

CROSS-COMPLAINT—

See **PLEADING**.

CROSS-EXAMINATION—

See **WITNESSES**.

DAMAGES—

See **ASSAULT AND BATTERY**; **EMINENT DOMAIN**; **NUISANCE**; **RAILROADS**.

For refusal to transport grain, see **CARRIERS**, 6; *Pittsburgh, etc., R. Co. v. Wood*, 1, 13 (18).

To husband, or wife, see **CARRIERS**.

For other sickness caused by personal injuries, see **CARRIERS**, 39; *Terre Haute Traction, etc., Co. v. Payne*, 132, 141 (10).

DAMAGES—Continued.

For injuries exciting predisposition to disease, see CARRIERS, 40; *Indiana Union Traction Co. v. Ohne*, 632, 635 (3).

For breach of contract for support, see CONTRACTS, 29; *Saylor v Obendorf*, 436, 439 (2).

Right of frontagers to, barred by railroad company's use of the street twenty years, see LIMITATION OF ACTIONS, 2; *Chicago, etc., R. Co. v. Johnson*, 162, 171 (10).

None for grading streets, see MUNICIPAL CORPORATIONS, 8; *Chicago, etc., R. Co. v. Johnson*, 162, 167 (2).

For saloon nuisance, see NUISANCE, 11; *Joseph Schlitz Brewing Co. v. Shiel*, 623, 624 (2), 626 (2).

On demurrer to evidence, how assessed, see TRIAL, 7; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 360 (1).

Amount of, in eminent domain, cross-examination of witnesses concerning, see WITNESSES, 3; *Indianapolis, etc., R. Co. v. Shca*, 608, 612 (6).

1. *Suffering of Wife.—Husband's Recovery for.*—A husband cannot recover damages for the pain and suffering of his wife.
Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 406 (5).
2. *Injunction.—Adequate Remedy.—Nuisance.—Skating-Rink.*—A judgment for damages is not adequate relief, where defendants are operating a skating-rink, thereby driving away plaintiffs' customers.
Foor v. Edwards, 259, 261 (4).
3. *Railroads.—Streets.—Frontagers.*—A railroad company that is compelled by a city to straighten its tracks in a street, requiring the track to be laid on the opposite side of the street from where it formerly lay, is liable in damages for the additional burden to the frontagers upon such side of the street.
Chicago, etc., R. Co. v. Johnson, 162, 170 (9), 171 (9).
4. *Diminution of.—Expenses.—Railroads.—Freight.*—A shipper whose freight is refused by a railroad company must handle his goods so as to reduce as much as possible his damages, and, in doing so, is entitled to recompense for expenses incurred.
Pittsburgh, etc., R. Co. v. Wood, 1, 13 (17).
5. *Measure of.—Railroads.—Delay in Transporting Goods.*—The damages recoverable against a railroad company for its delay in transporting goods is the difference in price of the goods at the time when they should have arrived, and when they actually arrived at their destination, less the freight charges.
Pittsburgh, etc., R. Co. v. Wood, 1, 12 (16).
6. *Breach of Covenant.—Deeds.—Reformation.*—In an action for damages for a breach of covenant in a deed covering, by mistake, certain land not owned by the grantor, damages being given only for the value of such land so included by mistake, such damages cannot be sustained, where the court decreed a reformation of such deed so as not to cover such land.
Tennyson v. Fleener, 50, 51 (2).
7. *Excessive.*—An award of \$1,000, to a married woman, twenty-seven years old, thrown from a street-car and receiving injuries, which caused intense pain, depression, and impairment of hearing and sight, is not excessive.
Indianapolis Traction, etc., Co. v. Ulrick, 149, 152 (3).
8. *Excessive.—Negligence.*—A judgment for \$4,000, in favor of a woman thirty-five years old, permanently injured in her health

DAMAGES—Continued.

by the negligence of an interurban railroad company, while she was a passenger on its car, is not excessive.

Indiana Union Traction Co. v. Ohne, 632, 637 (9).

9. *Excessive.—Verdict.—Consideration of Evidence.*—A verdict for \$5,000, for the negligent killing of a man forty-seven years old, earning \$1,000 per year, affirmatively shows that the jury did not go outside of the evidence in determining the amount of damages.

Indianapolis, etc., Traction Co. v. Newby, 540, 548 (8).

DEATH—

Effect upon mandate affirming judgment, see **APPEAL**, 65.

Actions for, see **MASTER AND SERVANT**.

DECEDENTS' ESTATES—

See **DESCENT AND DISTRIBUTION**; **EXECUTORS AND ADMINISTRATORS**.

DECEIT—

See **TRADE-MARKS AND TRADE-NAMES**.

Misrepresenting one's goods as those of another, see **COMMERCE**;
Computing Cheese Cutter Co. v. Dunn, 20, 23 (1).

In use of trade-name, see **FRAUD**, 2-4; *Computing Cheese Cutter Co. v. Dunn*, 20.

DECLARATIONS—

See **EVIDENCE**.

DEEDS.

I. REQUISITES AND VALIDITY.

- (a) **NATURE AND ESSENTIALS**, 1-4.
- (b) **FORM AND CONTENTS**, 5-10.
- (c) **DELIVERY**, 11-13.
- (d) **VALIDITY**, 14.

II. CONSTRUCTION AND OPERATION.

- (a) **GENERAL RULES**, 15, 16.
- (b) **ESTATES AND INTERESTS CREATED**, 17-21.

III. PLEADING AND EVIDENCE, 22.

Damages for breach of covenant, see **DAMAGES**, 6; *Tennyson v. Fleener*, 50, 51 (2).

From children of first wife, of lands held by a childless second wife, see **DESCENT AND DISTRIBUTION**, 11; *Layton v. Herr*, 203, 207 (5).

Delivery of, see **EVIDENCE**, 10, 11, 15; *Pethtel v. Pethtel*, 664.

Of infant constituting a fraud, see **FRAUD**, 7; *Ackerman v. Hawkins*, 483, 490 (1), 494 (1).

May be reformed, see **REFORMATION**; *Tennyson v. Fleener*, 50, 51 (1).

General verdict against party claiming deed was delivered is a finding of no delivery, see **TRIAL**, 23; *Pethtel v. Pethtel*, 664, 671 (10).

Taken in wrong name constitutes trust in favor of beneficiary, see **TRUSTS**, 2; *Dressel v. Lobstein*, 595.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS.

1. *Consideration.—Married Woman.*—A deed executed by a married woman in consideration of lands conveyed, at her request, to her husband and her father-in-law, upon an agreement by them

DEEDS—Continued.

subsequently to convey certain of such lands to her, is supported by a consideration moving to her.

Ackerman v. Haickins, 483, 493 (2).

2. *Consideration.—Expectant Forced Heirs of Childless Second Wife.—Estoppel.*—A deed from the expectant forced heirs of a childless second wife, of the land to be inherited, in trust for the benefit of the grantors, does not preclude such grantors, under §3020 Burns 1908, Acts 1890, p. 131, §3, estopping such children when a deed is executed thereto supported by a valuable consideration, from claiming such lands.

Dodd v. Shanton, 377, 381 (5).

3. *Conveyance of Expectancy.—Requisites.*—A conveyance of an expectancy is never presumed, is always viewed with suspicion, and the grantee must show that it was made in good faith, without fraud, and upon the receipt of full value.

Layton v. Herr, 203, 206 (4).

4. *Tax Sales.—Presumptions.—Liens.*—A tax deed is presumed to be legal and to vest in the grantee an absolute title in fee simple; but if it be illegal, it, nevertheless, constitutes a lien for the amount paid.

Ellison v. Branstrator, 307, 313 (9), 314 (9).

(B) FORM AND CONTENTS.

5. *Granting Clause.*—A deed reciting that the grantor and his wife "convey and warrant" to the grantee a certain tract of land, conveys the fee-simple title to the grantee (§3958 Burns 1908, §2927 R. S. 1881), the words "heirs" and "assigns" being unnecessary (§3960 Burns 1908, §2929 R. S. 1881).

Adams v. Merrill, 315, 320 (1), 327 (1), 328 (1).

6. *Granting Clause.—Limiting Scope of.*—The use of the words "convey and warrant" in the granting clause of a deed may be controlled by modifying and limiting words used in the habendum clause of such deed.

Adams v. Merrill, 315, 320 (2), 328 (2).

7. *Granting Clause.—Limiting.*—A deed by which the grantors "convey and warrant to Luzette Merrill [certain land], said Luzette Merrill * * * to have and to hold the use of the lands * * * during her natural life, and upon her death the absolute title in fee simple * * * shall vest in the heirs of the body of said Luzette Merrill" and that "in case said Luzette Merrill shall die without leaving any heirs of her body living at the time of her decease, then upon the death of said Luzette Merrill the title to one-third of said lands shall vest in Ira Merrill, the husband of said Luzette Merrill, and the title to the remaining two-thirds of said land shall vest in the heirs of the body of Martha K. Adams, sister of said Luzette Merrill," gives to Martha K. Adams, or, if dead, to her children, two-thirds of such land, and to the husband of Luzette Merrill one-third thereof, in the event of the death of Luzette Merrill leaving no living child.

Adams v. Merrill, 315, 322 (3), 323 (3), 324 (3), 325 (3).

8. *"Heirs of the Body."*—The words "heirs of the body," as used in a deed giving certain land to a daughter and upon her death to her children and "heirs of the body" of said daughter then living, import children.

Adams v. Merrill, 315, 324 (7).

9. *"Children."*—*"Heirs of the Body."*—*Adopted Child.*—An adopted child takes no title under a deed to his adoptive mother and her "children" and the heirs of her body living at her death.

Adams v. Merrill, 315, 326 (11).

DEEDS—Continued.

10. *Warranty*.—"Heirs."—At the common law the word "heirs" was necessary to a deed in granting an absolute title, the failure to use which resulted in the creation of a life estate.
Adams v. Merrill, 315, 328 (13).

(C) DELIVERY.

11. *Jury*.—Delivery is essential to the validity of a deed, and is a question of fact for the jury. *Pethtel v. Pethtel*, 664, 667 (1).
12. *Elements*.—The delivery of a deed is largely a question of intention, but it must be manifested by words or acts, or by both.
Pethtel v. Pethtel, 664, 667 (2).
13. *Escrow*.—The delivery of a deed to a third person to be delivered to the grantee, must be wholly unconditional, and must be accompanied by a statement of the nature of such deed and with specific directions that it be delivered absolutely to the grantee, or for his benefit.
Pethtel v. Pethtel, 664, 667 (3).

(D) VALIDITY.

14. *Partition*.—*Childless Second Wife*.—*Forced Heirs*.—A deed by a childless second wife's expectant forced heir—a child by the husband's former marriage—to such wife merely for the purpose of partitioning such husband's land, conveys no additional title.
Dodd v. Shanton, 377, 381 (4).

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES.

15. *Words*.—Courts will give effect to all of the words used in a deed, and give them their ordinary meaning when possible.
Adams v. Merrill, 315, 323 (4), 329 (4).
16. *Legal*.—*Equitable*.—*Merger*.—*Tax Sales*.—The holder of a tax deed who afterwards receives a conveyance of the land from the owners may, when equity requires it, enforce his rights under the tax sale, since equity keeps the tax lien alive to protect his rights.
Ellison v. Branstrator, 307, 314 (10).

(B) ESTATES AND INTERESTS CREATED.

17. *Quitclaim*.—*Estates in Expectancy*.—*Estoppel*.—A quitclaim deed does not operate upon an estate in expectancy, and the grantor is not estopped from claiming such estate when it becomes vested.
Layton v. Herr, 203, 205 (2).
18. *Expectant Estates*.—*Childless Widow*.—*Heirs*.—*Estoppel*.—Under §§3020, 3023 Burns 1908, Acts 1890, p. 131, §3, and Acts 1907, p. 71, §1, a father's children by a prior marriage are estopped from claiming title as forced heirs of their father's subsequent childless widow, where they have conveyed such land and have received pay therefor.
Layton v. Herr, 203, 206 (3).
19. *Remainders*.—*Limiting after Grant of Estate Tail*.—A valid remainder may be limited after the grant of an estate tail (§3004 Burns 1908, §2958 R. S. 1881). *Adams v. Merrill*, 315, 323 (5).
20. *Remainder with Double Aspect*.—A deed may provide, on the happening of a designated contingency, for the gift of a remainder in fee to certain persons, and to others upon the failure of the happening of such contingency. *Adams v. Merrill*, 315, 323 (6).
21. *Remainder to Children*.—*Shelley's Case*.—A deed giving to the grantors' daughter a life estate, remainder to her children and

DEEDS—Continued.

"the heirs of the body" of such daughter then living, gives a vested remainder to such children by purchase and not by descent.
Adams v. Merrill, 315, 325 (8).

III. PLEADING AND EVIDENCE.

22. *Delivery.—Evidence.*—Evidence that a grantor signed a deed conditioned upon his retention of the possession of the granted land "as he may see fit during his natural life," that he gave the deed to a third person directing that if the grantor predeceased such third person, he should give such deed to the grantee, that, at such person's request, the grantor placed such deed in the safe of a local merchant, with a direction for the merchant to keep it until the grantor called for it, and that if he did not, some one would, the merchant not knowing what the paper was, and that upon the death of the grantor, such merchant delivered it to the grantee, does not show a valid delivery, and, therefore, the deed passed no title. *Pethtel v. Pethtel*, 664, 668 (4), 670 (4).

DELIVERY—

See DEEDS.

DEMAND—

Complaint by redemptioner need not allege, where statute gives him lien for amounts paid, see CONTRIBUTION, 2; *Ellison v. Branstator*, 307, 310 (2).

DEMURBER—

See PLEADING.

DESCENT AND DISTRIBUTION—

See EXECUTORS AND ADMINISTRATORS.

Right of aliens to hold lands, see ALIENS; *Lehman v. State, ex rel.*, 330, 335 (6), 337 (6).

Deed from expectant forced heirs of childless second wife, see DEEDS, 2; *Dodd v. Shanton*, 377, 381 (5).

Decree in partition in suit between childless second wife and children of husband's former marriage, title given by, see JUDGMENT, 9; *Dodd v. Shanton*, 377, 382 (6).

1. *Regulation of.—Aliens.—Treaties.*—The power of the State to regulate the subject of descent and distribution of the property of aliens is subject only to constitutional restrictions, federal laws and treaties. *Lehman v. State, ex rel.*, 330, 334 (2).

2. *Aliens.—Powers of States.*—The State, in the absence of constitutional restrictions, federal laws, or treaty rights, may deny to aliens the privilege of inheriting lands, or it may grant such right under restrictions which to it may seem proper.

Lehman v. State, ex rel., 330, 334 (3).

3. *Taking and Transmitting by.—Aliens.*—The power to take, and the power to transmit lands by descent are separate; and at the common law an alien could not take nor transmit, his right so to do being wholly statutory.

Lehman v. State, ex rel., 330, 336 (7).

DESCENT AND DISTRIBUTION—Continued.

4. *Contingent Remainder.—Adopted Children.*—An adopted child takes the interest of its adopting parents in a contingent remainder of land. *Adams v. Merrill*, 315, 325 (9).
5. *Adopted Children.*—Adopted children inherit the same as other children. *Adams v. Merrill*, 315, 326 (12).
6. *Heirs.—Living Persons.*—A living person has no heirs. *Adams v. Merrill*, 315, 329 (14).
7. *Lands Conveyed by Gift.—Statutes.*—Under §2907 Burns 1908, §2473 R. S. 1881, lands conveyed to an intestate by gift, or in consideration of love and affection, descend to the donor, if living, where such intestate leaves no husband, or wife, or children or the descendants thereof. *Klemm v. Frcad*, 587, 589 (1).
8. *Childless Widow.—Statutes.*—Under §2927 Burns 1908, §2405 R. S. 1881, providing that after the payment of debts, legacies and expenses of administration, a decedent's estate shall be distributed to his legal heirs, and §3018 Burns 1908, Acts 1889, p. 131, §1, providing that one-third of the personal property of an intestate, where there are two or more children surviving, shall descend to the widow, and if but one child, one-half shall descend to each, such widow takes such part only after the payment of debts. *Roberts v. Dimmett*, 566, 569 (4), 570 (4).
9. *Widows.—Election.—Wills.—Presumptions.*—A widow may elect not to take under her husband's will, and the presumption is that the law does not discriminate between the widow of a testate and of an intestate husband. *Roberts v. Dimmett*, 566, 570 (6).
10. *Childless Widow.—Heirs.—Expectancies.*—Under §2487 R. S. 1881 a childless second or subsequent wife, the husband's children by a former marriage being alive, took a fee simple in one-third of his real estate, his children being her forced heirs, such children having merely a fixed expectancy during her life. *Layton v. Herr*, 203, 205 (1).
11. *Childless Widow.—Conveyance by Children.—Burden of Proof.—Curative Statutes.*—Sections 3020, 3023 Burns 1908, Acts 1899, p. 131, §3, and Acts 1907, p. 71, §1, were enacted to prevent children of a father who subsequently left a childless widow from afterwards claiming lands inherited from such widow, which they had sold and for which a fair price had been received, but the burden is upon the grantee to prove that such children intended to convey their expectant estate. *Layton v. Herr*, 203, 207 (5).
12. *Widows.—Childless.*—Prior to the act of 1899 (Acts 1899, p. 131), a childless second wife took a fee simple in one-third of her husband's real estate, but his children by a former marriage, or their descendants, become her forced heirs. *Dodd v. Shanton*, 377, 381 (1).
13. *Widows.—Childless.—Forced Heirs.—Husbands of.*—Where a daughter by a former marriage is the expectant forced heir of her father's childless second wife, and she, together with her only child, predeceases such childless second wife, her husband takes no interest in such land, the act of 1901 (Acts 1901, p. 554) providing that the children, or their descendants, shall become such heirs. *Dodd v. Shanton*, 377, 381 (2).
14. *Widows.—Childless.—Heirs of.—Law Governing.*—The law in force at the death of a childless second wife governs as to the persons who shall be her heirs. *Dodd v. Shanton*, 377, 381 (3).

DESCENT AND DISTRIBUTION—Continued.

15. *Husband to Wife.*—Under §3028 Burns 1908, §2490 R. S. 1881, a surviving widow takes her intestate husband's entire estate, where he left no child, father nor mother.
Klemm v. Fread, 587, 590 (2).
16. *Husband to Wife.—Lands Conveyed by Gift.*—Where an intestate leaves no children, or their descendants, father, or mother, lands conveyed to him by gift descend to his widow (§3028 Burns 1908, §2490 R. S. 1881), unless the donor survived the intestate, the donor's heirs not being included in the statutes (§2997 Burns 1908, §2473 R. S. 1881).
Klemm v. Fread, 587, 591 (4).
17. *Husband from Wife.—Estoppel.*—A husband, unless estopped, inherits one-third of his deceased wife's real estate free from her postnuptial debts.
Hampton v. Murphy, 513, 519 (3).
18. *Husband from Wife.—Debts.—Estoppel.—Mortgages.*—A husband who joins his wife in executing a mortgage upon her real estate is estopped, at her death, to claim his one-third interest in such land, where such part is necessary to pay the mortgage.
Hampton v. Murphy, 513, 520 (4).
19. *Husband and Wife.—Mortgage Debts.*—The same rules, as to the payment of mortgage debts, applying to the inheritance by a wife from her husband apply to the inheritance of a husband from his wife.
Hampton v. Murphy, 513, 521 (6).
20. *Husband from Wife.—Mortgage Debts.*—A husband's one-third interest in his deceased wife's real estate is liable, if necessary, for the payment of her mortgage.
Hampton v. Murphy, 513, 521 (7).
21. *Sales of Real Estate to Pay Debts.—Including Husband's Part.—Estoppel.*—Where a surviving husband is made a party to a petition to sell real estate to pay his deceased wife's mortgage debts, and he defaults, a decree being entered to sell the fee simple title, and giving the husband his portion out of the proceeds, and he accepts such portion, recelpting the administrator in full for his share, he is estopped from claiming any interest in such real estate.
Hampton v. Murphy, 513, 520 (5), 522 (5).

DIRECTORS—

See CORPORATIONS.

DISMISSAL AND NONSUIT—

Appeal will be dismissed, where no question is presented, see APPEAL, 37; *Cole Carriage Co. v. Hornbeck*, 61, 64 (4).

DIVORCE—

1. *Allowances to Wife for Expenses.*—A wife who has sufficient property should not be granted a temporary allowance *pendente lite*, but where a wife secures a divorce, or a husband's application is denied, the statute (§1080 Burns 1908, §1042 R. S. 1881) requires an allowance covering the expenses of the wife; and the sum of \$200 is not excessive in a contested case, where the husband's property is valued at more than \$6,000.
Boggs v. Boggs, 397, 400 (4).
2. *Alimony.—Amount of.*—The amount of alimony to be given in a divorce case is largely discretionary with the court.
Boggs v. Boggs, 397, 398 (1).

DIVORCE—Continued.

3. *Alimony.—Measure of.*—A wife who secures a divorce should be granted alimony sufficient to place her in as good a financial position as she occupied during marriage.
Boggs v. Boggs, 397, 399 (2).
4. *Alimony.—Evidence.*—Alimony in the sum of \$3,000 given to a wife who is granted a divorce because of her husband's cruelty, the evidence showing that he owned land valued at \$6,425, and a life estate in other land having an annual rental value of \$1,272, is not excessive.
Boggs v. Boggs, 397, 399 (3).
5. *Alimony.—Instalments.—Stay.—Motion to Modify Judgment.—Appeal.*—A judgment for alimony made payable in instalments conditioned upon defendant's staying the judgment is not bad, the presumption being that the stay was to be given as required by statute (§§732, 733 Burns 1908, §§600, 691 R. S. 1891); and no question can be raised, on appeal, as to the form of judgment, there being no motion to modify.
Boggs v. Boggs, 397, 400 (5).

DRAINS—

For carrying off surface-waters, may be discontinued, see MUNICIPAL CORPORATIONS, 23; *Finley v. City of Kendallville*, 430, 432 (1).

Liens for construction of, inferior to tax liens, see TAXATION; *Ellison v. Branstrator*, 307, 313 (8).

EASEMENTS—

See RAILROADS; VENDOR AND PURCHASER.

Of railroad companies to use streets, see MUNICIPAL CORPORATIONS, 10; *Chicago, etc., R. Co. v. Johnson*, 162, 170 (7).

ELECTION—

To take alternative under a contract, see CONTRACTS, 30; *Indiana, etc., Oil Co. v. Stewart*, 554, 556 (2), 560 (2).

By widow, see DESCENT AND DISTRIBUTION, 9; *Roberts v. Dimmett*, 566, 570 (6).

Of holding another term, see LANDLORD AND TENANT, 2-4; *C. Callahan Co. v. Michael*, 215.

ELECTRICITY—

See NEGLIGENCE.

Action for injury to servant by, see MASTER AND SERVANT, 35, 36; *Raley v. Evansville Gas, etc., Co.*, 649.

Electric light companies, by setting poles in street, impliedly permit other companies to use their poles for arranging their wires, see TELEGRAPHS AND TELEPHONES, 5; *Beaning v. South Bend Electric Co.*, 261, 271 (6).

ELECTRIC LIGHTS—

See ELECTRICITY.

EMERY WHEELS—

See MASTER AND SERVANT, 10.

EMINENT DOMAIN—

Cross-examination of witness as to amount of damages, see WITNESSES, 3; *Indianapolis, etc., R. Co. v. Shea*, 608, 612 (6).

1. *Railroads.—Damages to Frontagers.—Complaint.*—A complaint by the owner of a lot fronting upon a street over which defendant railroad company had constructed its track, alleging that the use of the street by such company totally destroyed the value of his house as a residence and "depreciated the value of said property" in the sum of \$5,000, shows that the market value of plaintiff's property was depreciated.

Indianapolis, etc., R. Co. v. Shea, 608, 610 (1).

2. *Railroads.—Construction with Consent of Frontager.—Damages.—Answer.*—An answer alleging that the defendant railroad company constructed its track upon the street in front of plaintiff's lot, and that he consented thereto, is bad in an action for the damages caused thereby.

Indianapolis, etc., R. Co. v. Shea, 608, 611 (2).

3. *Railroads.—Damages.—Measure of.*—The measure of damages to a frontager whose property abutted the street upon which defendant railroad company had constructed its road, is the difference in value of his property before and after the construction and operation of such road.

Indianapolis, etc., R. Co. v. Shea, 608, 611 (4).

4. *Damages to Frontagers.—Instructions.—Applicability.*—In an action for damages against a railroad company for constructing its track upon the street in front of plaintiff's property, an instruction that such company can be compelled to construct switches and sidings necessary to accommodate elevators, mills and factories built along the line thereof, is not applicable.

Indianapolis, etc., R. Co. v. Shea, 608, 612 (5).

EMPLOYERS' LIABILITY ACT—

See MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

EQUITY—

See CONTRIBUTION; INJUNCTION; TRESPASS.

Keeps lien alive to protect rights of parties, see DEEDS, 16; *Ellison v. Branstrator*, 307, 314 (10).

ESCROW—

Delivery in, see DEEDS, 13; *Pethtel v. Pethtel*, 664, 667 (3).

ESTATES—

See DEEDS; DESCENT AND DISTRIBUTION; REAL PROPERTY; VENDOR AND PURCHASER; WILLS.

1. *Fee-Tail.—Statutes.*—Fee-tails are by statute (§3904 Burns 1908, §2958 R. S. 1881), made fee-simple titles.

Lec v. Lee, 645, 649 (4).

2. *"Property."—Statutes.*—The word "property," as used in §1356 Burns 1908, §1285 R. S. 1881, providing that real "property" shall include "lands, tenements and hereditaments," includes every species of title, inchoate or complete, and every right which lies in contract, executory or executed.

Adams v. Merrill, 315, 326 (10).

ESTOPPEL—

Where parties construe contract and one thereof acquires rights thereunder, other party is estopped to deny such construction. see **CONTRACTS**, 21; *Coulter v Crawfordsville Trust Co.*, 64, 65 (4).

Failure to give directions, where contract requires the giving thereof, estops person whose duty it is to give, from claiming a breach, see **CONTRACTS**, 28; *Jennings v. Shertz*, 120, 130 (7).

Of deed by expectant forced heirs of childless second wife, see **DEEDS**, 2; *Dodd v. Shanton*, 377, 381 (5).

None against person claiming an expectancy, where he had executed only a quitclaim deed, see **DEEDS**, 17, 18; *Layton v. Herr*, 203.

In absence of, husband inherits one-third of wife's real estate, see **DESCENT AND DISTRIBUTION**, 17, 18; *Hampton v. Murphy*, 513.

Of husband to claim his interest in wife's land, where it was sold on petition to pay debts and he accepted proceeds, see **DESCENT AND DISTRIBUTION**, 21; *Hampton v. Murphy*, 513, 520 (5), 522 (5).

Surrender of policy by assured and cancelation of premium note, estop beneficiary from claiming insurance, see **INSURANCE**, 5; *Equitable Life Assur. Soc., etc., v. Stough*, 411, 415 (5).

Of frontagers who stand by while alley improvements are made, see **MUNICIPAL CORPORATIONS**, 21; *City of Logansport v. Webster*, 499, 504 (6).

Party estopped to complain of defects in instructions, where such party asked instructions containing same defect, see **TRIAL**, 18; *Lake Erie, etc., R. Co. v. Cotton*, 580, 585 (6).

EVIDENCE.

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| <p>I. PRESUMPTIONS, 1, 2.</p> <p>II. RELEVANCY, MATERIALITY AND COMPETENCY, 8-8.</p> <p>III. ADMISSIONS, 9-11.</p> <p>IV. DECLARATIONS, 12-17.</p> <p>V. DOCUMENTARY EVIDENCE, 18, 19.</p> | <p>VI. PAROL EVIDENCE VARYING WRITINGS, 20-22.</p> <p>VII. OPINION EVIDENCE, 23.</p> <p>VIII. EVIDENCE AT FORMER TRIAL, OR IN OTHER PROCEEDINGS, 24.</p> |
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See **JURY**; **WITNESSES**.

Erroneous admission of, to be questioned on appeal, must be made cause for a new trial, see **APPEAL**, 8; *New Long Distance Tel. Co. v. White*, 382, 386 (2).

Insufficiency of, to support judgment, can be considered on appeal, only where all of the evidence is in record, see **APPEAL**, 10; *McGary v. Yeager*, 696.

When questioned, on appeal, must be set out in brief, see **APPEAL**, 34, 35.

Appellate Court will not weigh, see **APPEAL**, 41-52.

Questions concerning, not reviewable, where evidence is not in record, see **APPEAL**, 35, 62.

Admission, or exclusion of, where not prejudicial, harmless error, see **APPEAL**, 54, 55.

Where defendant demurs to, rulings on answers are harmless, see **APPEAL**, 56; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 360 (2).

Judgment resting upon incompetent evidence will be reversed, see **APPEAL**, 64; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (4).

EVIDENCE—Continued.

Sufficiency of, in action on note, see **BILLS AND NOTES**, 11; *Poetker v. Tindle*, 455, 456 (2).

In action against carrier for failure to transport goods, see **CARRIERS**, 8; *Pittsburgh, etc., R. Co. v. Wood*, 1, 11 (12).

Showing discrimination by railroad company, see **CARRIERS**, 11; *Pittsburgh, etc., R. Co. v. Wood*, 1, 12 (14), 17 (14).

Instruction as to consideration of hypothetical questions and answers, see **CARRIERS**, 37; *Terre Haute Traction, etc., Co. v. Payne*, 132, 143 (12).

Showing part payment and partial delivery taking contract from operation of statute of frauds, see **CONTRACTS**, 4; *S. Bash & Co. v. Sible*, 408.

Should not be set out in special findings, see **CONTRACTS**, 38; *Shelton v. Lundin*, 172, 177 (3).

Falling to show a delivery of a deed, see **DEEDS**, 22; *Pethtel v. Pethtel*, 664, 668 (4), 670 (4).

Showing reasonable amount of alimony, see **DIVORCE**, 4; *Boggs v. Boggs*, 397, 399 (3).

Courts take judicial notice that coal burned in generating power does not go into the oil well that is being drilled, see **MECHANICS' LIENS**, 1; *Niagara Oil Co., v. McBee*, 576, 579 (1).

Parol evidence, admissible to show the receipt and opening of bids for alley improvements, see **MUNICIPAL CORPORATIONS**, 19; *City of Logansport v. Webster*, 499, 502 (3).

Proximate cause and negligence may be established by circumstantial, see **NEGLIGENCE**, 6; *City of Fort Wayne v. Merriman*, 286, 288 (2).

Sufficiency of, to charge city with negligence in maintaining bridge, see **NEGLIGENCE**, 12; *City of Fort Wayne v. Merriman*, 286, 289 (3).

Sufficiency of, in action for negligence against telephone and electric light companies, see **NEGLIGENCE**, 13; *Beaning v. South Bend Electric Co.*, 261, 279 (12).

Falling to show that saloon was nuisance, see **NUISANCE**, 11; *Joseph Schlitz Brewing Co. v. Shiel*, 623, 624 (2), 626 (2).

Showing contract by parent to pay child for services, see **PARENT AND CHILD**, 2; *Hill v. Hill*, 99, 100 (2).

Cannot be considered in determining sufficiency of complaint, see **PLEADING**, 5; *Hill v. Ward*, 458, 465 (6).

Of accident at railroad and street crossing, see **RAILROADS**, 23; *Cleveland, etc., R. Co. v. Moore*, 58, 60 (5).

Instruction concerning consideration of, as to amount of damages, see **RAILROADS**, 28; *Indianapolis, etc., Traction Co. v. Newby*, 540, 545 (7).

Instructions should be applicable to, see **SALES**, 1; *McCasky Register Co. v. Curfman*, 297, 303 (1); see **TRIAL**, 11.

Demurrer to, rule as to assessment of damages, see **TRIAL**, 7; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 360 (1).

On demurrer to, court considers only the evidence most favorable to plaintiff, see **TRIAL**, 8; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 360 (3).

EVIDENCE—Continued.

Where special findings omit necessary fact, finding should be against one having burden of proof, see **TRIAL**, 35; *Mayer v. C. P. Lesh Paper Co.*, 250, 251 (1).

Burden of proof in actions on notes, see **BILLS AND NOTES**.

Burden of proof, in action for injury to passenger, see **CARRIERS**, 24; *Lake Erie, etc., R. Co. v. Cotton*, 580, 586 (7).

Burden of proving allegations of complaint, on plaintiff, see **MASTER AND SERVANT**, 42; *Indianapolis Foundry Co. v. Bradley*, 530, 532 (1).

Burden of proving agent's authority to make oral contracts contradictory to printed, upon person claiming under such oral contract, see **SALES**, 2; *McCaskey Register Co. v. Curfman*, 297, 303 (2), 305 (2).

Burden of proving ability to perform tender, upon the person making tender, see **TENDER**, 2; *Supreme Tent, etc., v. Fisher*, 419, 427 (7).

I. PRESUMPTIONS.

1. *Contradicting Physical Facts*.—A person is conclusively presumed to hear what is clearly audible, and to see what is plainly visible. *Cleveland, etc., R. Co. v. Moore*, 58, 61 (6).

2. *Burden of Proof*.—Every one is presumed to obey the law, and he who alleges against another an evil act or an evil intent has the burden of proving it.

Joseph Schlitz Brewing Co. v. Shick, 623, 626 (5).

II. RELEVANCY, MATERIALITY AND COMPETENCY.

As to admission and exclusion of, see **TRIAL**.

Earnings of decedent, admissible, see **RAILROADS**, 25; *Indianapolis, etc., Traction Co. v. Newby*, 540, 543 (4).

Signal custom of steam railroads, not admissible in action against interurban company for injuries because of failure to give signal at crossing, see **RAILROADS**, 26; *Indianapolis, etc., Traction Co. v. Newby*, 540, 544 (5).

3. *Character of Household.—Injuries to Wife.—Husband's Damages.—Railroads*.—In an action for damages, by a husband, for injuries to his wife, evidence that, in addition to his own family, he employed at times four farm hands, is admissible as showing the value of her services.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 405 (3).

4. *Injured Condition of Wife on Night of Injury.—Railroads*.—Evidence of the condition of his wife on the night of the accident is admissible in an action for damages by the husband against an interurban railroad company for injuries to such wife.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 405 (4).

5. *Extent of Injuries.—Partly Incompetent Answers.—Motions to Strike Out*.—Where a physician in answer to a question as to the extent of the injuries to plaintiff's wife said that the prognosis for getting well was bad, that the condition might go on, and that she might become insane or epileptic, or develop abscesses on the

EVIDENCE—Continued.

brain, a motion to strike out the entire answer should be overruled, the incompetent parts, even if improperly retained, not constituting reversible error.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 407 (7).

6. *Inferences.—Regular Passenger-Train.—Railroads.—Master and Servant.*—Evidence that a regular passenger-train upon defendant's road killed the plaintiff's decedent justifies a jury in inferring that such train belonged to defendant, and that its employees were acting in the line of their duty.

Pittsburgh, etc., R. Co. v. Rogers, 230, 242 (14).

7. *Mortality Tables.—Expectancy.—Master and Servant.*—In an action by the personal representative of a deceased servant for the recovery of damages for such servant's death, tables of mortality are admissible in evidence to show the decedent's expectancy.

Pittsburgh, etc., R. Co. v. Rogers, 230, 244 (16).

8. *Right of Others to Ride on Train.*—In an action by the plaintiff for personal injuries sustained in alighting from defendant's interurban railroad company's car, evidence as to another's right to passage to another point, and of another's payment of fare, is wholly irrelevant.

Indianapolis, etc., Transit Co. v. Walsh, 42, 48 (7).

III. ADMISSIONS.

9. *Declarations of Assured After Suspension.—Insurance.*—Declarations by an assured, made after his suspension by a beneficial association for nonpayment of dues, that he had decided to drop the insurance and that after advising with his wife—the beneficiary—he decided not to carry it any further, are admissible, in an action by his beneficiary.

Supreme Tent, etc., v. Fisher, 419, 425 (3).

10. *Declarations of Grantor.—Intentions.—Deeds.—Delivery.—Husband and Wife.*—In a suit involving the delivery of a deed signed by a husband, purporting to convey all of such husband's land to certain of his children, declarations of such husband, prior to his second marriage, that he intended to execute a contract with his intended wife by which he should retain all of his property, and she should retain hers, is not competent, where no such contract was ever executed. *Pethtel v. Pethtel*, 664, 670 (6).

11. *Delivery of Deed.—Declarations of Grantor.*—In a suit involving the delivery of a deed, evidence that the grantor took the deed to one of the grantees and had him read it to the grantor, and that such grantee notified the other grantees thereof, is inadmissible.

Pethtel v. Pethtel, 664, 671 (7).

IV. DECLARATIONS.

12. *Trustees.*—Declarations of a wife as to how she came into possession of, and the purpose for which she holds, a certain certificate of deposit given to her by her husband, to be delivered at his death, to a third person, are admissible in determining the real beneficiary.

Traylor v. Hollis, 680, 682 (2).

13. *Of Nominal Purchaser.—Resulting Trusts.*—Declarations of a nominal purchaser, while he holds the title to the lands in controversy, are admissible to establish a resulting trust in favor of third persons.

Traylor v. Hollis, 680, 682 (3).

EVIDENCE—Continued.

14. *Of Trustee After Expiration of Trust.*—Declarations of a trustee, after parting with the possession of the subject-matter of the trust, are not admissible to show the rightful beneficiary.
Traylor v. Hollis, 680, 683 (4).
15. *Of Third Persons.—Deeds.—Delivery.*—Declarations of a third person as to the execution of a deed are inadmissible in an action contesting the delivery of such deed.
Pethtel v. Pethtel, 664, 671 (8).
16. *Of Pain.—Interurban Railroads.*—Evidence of plaintiff's declarations of pain made to the witness on her second visit to plaintiff, is admissible.
Indianapolis, etc., Transit Co. v. Walsh, 42, 46 (4).
17. *Bias.—Offer of Proof.*—Evidence of witness's refusal to tell the defendant's attorney what the plaintiff said upon a certain occasion, and that the witness instructed his wife not to inform defendant's attorney thereof, is inadmissible, where there was nothing to show that the plaintiff's declarations concerned the subject-matter of the litigation.
Indianapolis, etc., Transit Co. v. Walsh, 42, 47 (5).

V. DOCUMENTARY EVIDENCE.

Verified exceptions to report of partition, value as evidence, see PARTITION, 2; *Selvaige v. Green*, 642, 644 (2).

18. *Letters.—Relevancy.*—Letters that are not relevant to the issues in a case are not admissible in evidence.
Bottorff v. Bottorff, 692, 693 (4).
19. *City Ordinances.—How Proved.*—The introduction of the ordinary record of a city constitutes *prima facie* evidence of the validity of the ordinances therein contained, and unless their proper enactment is questioned no further proof is required.
Pittsburgh, etc., R. Co. v. Rogers, 230, 246 (18).

VI. PAROL EVIDENCE VARYING WRITINGS.

Parol evidence, not admissible to vary writing, see VENDOR AND PURCHASER, 13; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (3).

20. *Admissibility.—Varying Written Contracts.*—Parol evidence is competent to show that a written contract has never gone into force, to invalidate it for fraud, to show an illegal consideration, and to supply a provision, not contradictory of, nor embraced by, the provisions therein.
Buffalo, etc., Quarries Co. v. Davis, 116, 120 (5).
21. *Oral.—Varying Written Contract.—Fraud.—Mistake.*—Oral evidence is not admissible to vary a complete written contract, except upon a showing of fraud or mistake, but such evidence may be admitted to supply an omission from an incomplete contract.
McCaskey Register Co. v. Curfman, 297, 304 (3).
22. *Striking Out.—Varying Written Contracts.—Vendors' Liens.—Collateral Security.*—In a suit to foreclose a vendor's lien for purchase money, where the vendor had testified that she was not to lose her vendor's lien by taking a certificate of stock for \$5,000, and that such stock was taken as "conditional security," it is reversible error to refuse to strike out such testimony, where a written contract was admitted in evidence, showing that she was to receive "as collateral security for the final \$5,000 a certificate

EVIDENCE—Continued.

for \$5,000 in the stock" of a certain company, and was given an option of exchanging this stock for its par value in cash.

Buffalo, etc., Quarries Co. v. Davis, 116, 117 (1).

VII. OPINION EVIDENCE.

23. *Condition of Railroad and Wagon Tracks.—Opinions as to Happening of Accident.*—Evidence of the appearance of vehicle tracks along a railroad track is admissible; but opinions as to how the accident occurred are improper.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 406 (6).

VIII. EVIDENCE AT FORMER TRIAL, OR IN OTHER PROCEEDINGS.

24. *Former Testimony of Nonresident Witness.*—The testimony of a nonresident witness upon a former trial is admissible in a subsequent trial.

Reichers v. Dammier, 208, 209 (1).

EXCEPTIONS—

See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PARTITION.

EXCEPTIONS, BILLS OF—

See APPEAL.

Making instructions part of record, see APPEAL, 13-20.

EXECUTION—

Complaint for contribution by redemptioner from sheriff's sale, see CONTRIBUTION, 2; *Ellison v. Branstrator*, 307, 310 (2).

Stay of, in collection of alimony, see DIVORCE, 5; *Boggs v. Boggs*, 397, 400 (5).

Work and Labor.—Work performed by a husband for his wife upon her separate estate is not subject to execution, nor can it be reached by his creditors.

Wasm v. Raben, 221, 229 (5).

EXECUTORS AND ADMINISTRATORS—

See DESCENT AND DISTRIBUTION.

1. *Debts.—From What Property Payable.*—The debts of a decedent constitute a primary charge against his personal property.

Roberts v. Dimmett, 566, 570 (5).

2. *Claims Against.—Complaint.—Sufficiency of.*—A claim against a decedent's estate, containing a definite statement of the liability, the amount thereof, and facts sufficient to bar another claim therefor, is sufficient. *Bailey v. Miller*, ante, 475, followed.

Bailey v. Wilson, 571.

3. *Debts.—Sale of Real Estate to Pay.—Petition.*—A petition by an administrator to sell real estate to pay his decedent's debts, which substantially complies with §2854 Burns 1908, §2338 R. S. 1881, is sufficient.

Hampton v. Murphy, 513, 519 (1).

4. *Claims.—"Theory of the Case."*—The "theory of the case" doctrine does not apply to claims against decedents' estates.

Dodge v. Lake Shore, etc., R. Co., 281, 283 (4).

5. *Failure to Make Final Settlement of.—Effect.*—An estate in which no final settlement has been made, must be considered as

EXECUTORS AND ADMINISTRATORS—Continued.

- pending until the completion of the business and the discharge of the administrator. *Fletcher v. Nicholson*, 375, 376 (1).
6. *Report.—Discharge.*—In the absence of any record of final settlement, an administrator may be required by the court to make a report. *Fletcher v. Nicholson*, 375, 376 (2).
7. *Settlement.—Distribution.—Interest.—Special Findings.*—Where the special findings, in an action by an heir against the administrator for his distributive share of the estate in question, show the amount of such share, that it was not paid to such heir or to anyone authorized to receive it, and that such heir was responsible for the delay in payment, such heir should recover his share without interest. *Fletcher v. Nicholson*, 375, 377 (3).
8. *Desperate Claims.—Liability for.—Laches.*—Where an administrator reports certain claims on behalf of his decedent as desperate, an heir cannot hold him liable therefor in an action filed thirty-seven years thereafter. *Fletcher v. Nicholson*, 375, 377 (4).
9. *Final Reports.—Exceptions.—Special Findings.—Venire de Novo.*—Where exceptions are filed to certain items of an administratrix's final report, special findings covering only such items are sufficient, and a motion for a *venire de novo* on the ground that they do not cover the whole report, should be overruled. *Roberts v. Dimmett*, 566, 568 (1).

EXPECTANCY—

Conveyance of, see **DEEDS**, 3; *Layton v. Herr*, 203, 206 (4).

EXPERTS—

See **WITNESSES**.

Testimony of, see **EVIDENCE**.

FACTORY ACT—

See **MASTER AND SERVANT**.

FAIRS—

Liability for negligence, see **NEGLIGENCE**, 4; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 361 (4).

FALSE REPRESENTATIONS—

See **FRAUD**.

FELLOW SERVANTS—

See **MASTER AND SERVANT**.

FENCES—

See **RAILROADS**.

Marking boundary lines, see **BOUNDARIES**.

Complaints compelling railroad companies to build, see **RAILROADS**, 5, 8.

FORECLOSURE—

See **CONTRIBUTION**; **MECHANICS' LIENS**; **MORTGAGES**.

FOREIGN JUDGMENT—

See **JUDGMENT**, 10-12.

FRAUD—

Defense of, in action by receiver, see ABATEMENT; *Vancleef v. Britton*, 388, 390 (3).

As a defense to an action on a note casts burden of proof that he is an innocent purchaser on holder of note, see BILLS AND NOTES, 4; *Hill v. Ward*, 458, 464 (4).

Representing one's goods as those of another, see COMMERCE; *Computing Cheese Cutter Co. v. Dunn*, 20, 23 (1).

In sale of furs, special findings in case of, see CONTRACTS, 37; *Klein v. Ninde*, 672, 673 (1).

Act of majority of directors of corporation in concealing their purpose does not constitute, see CORPORATIONS, 8; *Griffith v. Sprowl*, 504, 510 (3).

Oral evidence, admissible to vary written contract in case of, see EVIDENCE, 21; *McCuskey Register Co. v. Curfman*, 297, 304 (3).

In failing to describe, in deed all land sold, see SPECIFIC PERFORMANCE, 1, 2; *Boyce v. Holloway*, 535.

Failure of special findings to show, fatal to action based thereon, see TRIAL, 36; *Griffith v. Sprowl*, 504, 513 (9).

Vendor's misrepresentations may constitute, see VENDOR AND PURCHASER, 5-7; *Boltz v. O'Conner*, 178.

1. *Presumptions of*.—There is no presumption of fraud in Indiana, but such fact must be alleged and proved.

Griffith v. Sprowl, 504, 510 (4).

2. *Trade Names*.—*Deceit*.—The use of a trade name so similar to that of another that the public is deceived thereby, constitutes a fraud upon the person whose trade is thus despoiled.

Computing Cheese Cutter Co. v. Dunn, 20, 24 (3).

3. *Elements*.—*Separation of*.—*Unfair Competition*.—The essence of unfair competition is fraud, and it is determined from a consideration of all the circumstances combined.

Computing Cheese Cutter Co. v. Dunn, 20, 25 (4).

4. *Diversion of Mail*.—*Trade Names*.—*Unfair Competition*.—A person or corporation whose mail is diverted to another because the latter, for fraudulent purposes, has adopted a similar trade name, has a right of action for fraud and may restrain the further use of such trade name.

Computing Cheese Cutter Co. v. Dunn, 20, 27 (7).

5. *Husband and Wife*.—*Ancient Policy*.—The relation of husband and wife is considered in determining whether fraud exists, but the ancient policy of regarding them as one person is disregarded.

Wasem v. Raben, 221, 226 (3).

6. *Wife's Separate Property*.—*Husband's Services*.—*Recovery for*.—*by Trustee in Bankruptcy*.—The value of a husband's services in managing his wife's separate estate, where he has no community of property nor partnership therein, cannot be recovered from such wife, in an action by the husband's trustee in bankruptcy.

Cooper v. Ham, 49 Ind. 393, explained.

Wasem v. Raben, 221, 226 (4).

7. *Deeds*.—*Infants*.—*Misrepresentations as to Age*.—*Husband and Wife*.—A deed executed by a married woman having the appearance of being, and believed by the grantees to be, more than twenty-one years old, and two subsequent deeds executed by such woman to confirm such former deed, expressly showing that she was twenty-one years old, constitute a fraud upon the grantees,

FRAUD—Continued.

such woman having received and failed to return the consideration received (§§3979, 3980 Burns 1908, §§2944, 2945 R. S. 1881).
Ackerman v. Hawkins, 483, 490 (1), 494 (1).

FRAUDS, STATUTE OF—

Letters may constitute complete written contract, see CONTRACTS, 3; *Jennings v. Shertz*, 120, 125 (1).

Part payment and partial delivery as affecting contract, see CONTRACTS, 4; *S. Bash & Co. v. Sible*, 408.

As affecting railroad company's contract for employment of surgeon, see CONTRACTS, 14; *Southern R. Co. v. Hazelwood*, 478, 481 (4).

FRAUDULENT CONVEYANCES—

Wife's purchase of land with proceeds of caring for an infant, does not constitute, see HUSBAND AND WIFE, 2; *Elliott v. Atkinson*, 290, 292 (2).

Husband may convey property to wife in payment of debt, see HUSBAND AND WIFE, 3; *Boos v. Stegmund*, 284, 285 (1).

FREE GRAVEL ROADS—

See HIGHWAYS.

GAS AND OIL—

See CONTRACTS; COVENANTS.

GRAVEL ROADS—

See HIGHWAYS.

GUARANTY—

See SURETYSHIP AND GUARANTY.

GUARDIAN AND WARD—

1. *Report.—Exceptions.—Special Findings.—Motion for a Venire de Novo.—Action.*—Where the special findings, on exceptions to a guardian's final report, two items only of such report being contested, are sufficient, when considered along with the remainder of such report, upon which to base a judgment, a motion for a *venire de novo* should be overruled, such proceeding not being an ordinary civil action. *Hudspeth v. Kitchen*, 524, 526 (1).
2. *Contracts with Attorneys.*—A contract between a guardian and an attorney relative to attorneys' fees in the guardianship, is not conclusive upon the probate court. *Hudspeth v. Kitchen*, 524, 528 (2).
3. *Appointment.—Bonds.—Attorney and Client.—Fees.*—Compensation for the services of an attorney in securing the appointment of a guardian, and in the execution of his bond, is not payable out of the ward's estate. *Hudspeth v. Kitchen*, 524, 529 (3).
4. *Attorneys' Fees.—Allowance for.*—Guardians can be allowed only a reasonable sum for attorneys' fees; and if credit is asked for large sums paid an attorney pursuant to a contract with such attorney, such contract must be shown to be fair and reasonable. *Hudspeth v. Kitchen*, 524, 529 (4).

HIGHWAYS—

Abutting owners own to the middle of, see MUNICIPAL CORPORATIONS, 11; *Chicago, etc., R. Co. v. Johnson*, 162, 170 (8).

Use of, by Interurban railroad company, not necessarily a nuisance, see RAILROADS, 34; *Fowler v. Fort Wayne, etc., Traction Co.*, 441, 443 (3).

Supervisors of, proper parties to replevy road tools, see REPLEVIN: *Cathcart v. New Durham Tp.*, 102, 103 (1).

1. *Free Gravel Roads.—Acceptance of.—Protests by Taxpayers.—Time for Filing.*—Under §6911 Burns 1901, Acts 1901, p. 449, §13, providing that whenever the superintendent and the engineer of any free gravel road shall file verified statements of the completion of such road with the county auditor, which statements must be filed at least ten days before the first day of the regular term of the board of commissioners, any interested taxpayer may, "within said ten days," file his verified statement that such improvement is not completed, such taxpayer must file such statement within such ten days, or it may be stricken out on motion. *Board, etc., v. Zollman*, 184, 186 (1).

2. *Free Gravel Roads.—Acceptance of.—Protests by Boards of Commissioners.*—Boards of commissioners have no right to protest, on behalf of taxpayers, against the acceptance of a free gravel road, the superintendent and the engineer having filed their verified statements that such road has been completed. *Board, etc., v. Zollman*, 184, 187 (2).

3. *Supervisors.—Changing Boundaries of District.*—The mere change of boundaries of the road districts in a township does not vacate the office of road supervisor, of one of such districts, where the supervisor still resides in such district.

Cathcart v. New Durham Tp., 102, 103 (2).

HOSPITALS—

Salary of Superintendent, see MUNICIPAL CORPORATIONS, 5, 7; *City of Indianapolis v. Martin*, 256.

HUSBAND AND WIFE—

See DESCENT AND DISTRIBUTION; DIVORCE; FRAUD.

Actions for injuries to, see CARRIERS.

Husband cannot recover for suffering of wife, see DAMAGES, 1; *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401, 406 (5).

Consideration of deed by wife, see DEEDS, 1; *Ackerman v. Hawkins*, 483, 493 (2).

Evidence in action by husband for injury to wife, see EVIDENCE, 3-5; *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401.

Value of work performed by husband upon wife's separate estate, not subject to execution, see EXECUTION; *Waseem v. Raben*, 221, 229 (5).

Infant wife's deed may constitute fraud, see FRAUD, 7; *Ackerman v. Hawkins*, 483, 490 (1), 494 (1).

Execution of mortgage on wife's land, see MORTGAGES, 1; *Hampton v. Murphy*, 513, 519 (2).

1. *Wife's Right to Contract.*—A married woman may contract to care for the children of another, not a member of her husband's family, and enforce payment therefor in her own name.

Elliott v. Atkinson, 290, 292 (1).

HUSBAND AND WIFE—Continued.

2. *Contracts of Wife.—Caring for Infants.—Fraudulent Conveyances.*—A married woman who contracts to care for another person's children has the right to the compensation therefor; and land purchased with the money so received cannot be taken in payment of the debts of her insolvent husband.
Elliott v. Atkinson, 290, 292 (2).
3. *Fraudulent Conveyances.—Payment of Debts.—Insolvency.—Preferences.*—A conveyance made by an insolvent husband to his wife in payment of a debt is not necessarily fraudulent as to creditors, though such conveyance operates as a preference in her favor.
Boos v. Siegmund, 284, 285 (1).
4. *Wife's Powers.—Contracts.—Suretyship.—Real Property.*—A married woman's separate power to contract is denied only in cases of suretyship, sales or mortgages of real estate, and executory contracts to sell or mortgage real estate.
Wasem v. Raben, 221, 224 (1).
5. *Partnership.—Agency.*—A married woman may become a partner with her husband, borrow money from him, be sued by him, or appoint him as her agent.
Wasem v. Raben, 221, 225 (2).

IMPEACHMENT—

Of witness, cannot be demanded as to collateral matters, see WITNESSES, 6; *Bottorff v. Bottorff*, 692, 693 (5).

INFANTS—

See GUARDIAN AND WARD; PARENT AND CHILD.

Next friends liable for costs in actions by, see COSTS, 1; *Dodge v. Lake Shore, etc., R. Co.*, 281, 283 (2).

Deeds of, may constitute fraud, see FRAUD, 7; *Ackerman v. Hawkins*, 483, 490 (1), 494 (1).

Have two years, after arriving at twenty-one, within which to bring suits, see LIMITATION OF ACTIONS, 1; *Lewis v. Hershey*, 104, 109 (6).

Execution of mortgage by minor wife, see MORTGAGES, 2; *Ackerman v. Hawkins*, 483, 494 (3).

INFERENCES—

See EVIDENCE.

INJUNCTION—

See EQUITY.

Only adequate remedy for noise of skating rink, see DAMAGES, 2; *Foor v. Edwards*, 259, 261 (4).

Lies for the recovery of money unlawfully paid out by town, see MUNICIPAL CORPORATIONS, 24; *Campbell v. Brackett*, 293, 296 (5).

Against obstructing "free access" to depot, alleged violation of, see RAILROADS, 1-3; *Pittsburgh, etc., R. Co. v. Town of Remington*, 561.

Lies to compel railroad company to respect a right of way contract, see RAILROADS, 13; *Barth v. Pittsburgh, etc., R. Co.*, 434, 436 (2).

To prevent use of similar trade-name, see TRADE-MARKS AND TRADE-NAMES, 1-3; *Computing Cheese Cutter Co. v. Dunn*, 20.

INJUNCTION—Continued.

Lies to prevent continued trespasses, thereby avoiding a multiplicity of actions, see **TRESPASS**, 1; *Wirrick v. Boyles*, 698, 700 (4).

1. *Continued Trespasses.—Multiplicity of Actions.—Equity.—Complaint.*—A complaint alleging that defendant destroyed plaintiffs' fence, that plaintiffs rebuilt it, and defendant again destroyed it, and threatened to destroy any fence that might subsequently be erected, states a cause of action, equity having jurisdiction on the ground of preventing a multiplicity of actions.

Wirrick v. Boyles, 698, 700 (3).

2. *Violating Decree.—Railroads.—Access to Depots.—Complaint.*—A complaint alleging that in a prior suit defendant railroad company was ordered not to erect any obstruction which would prevent free access to its depot, and that such company has erected an enclosure which does prevent such access, is sufficient.

Pittsburgh, etc., R. Co. v. Town of Remington, 561, 565 (3).

3. *Telephones.—Interference With.—Decree.—Motions to Modify.*—Where the court found against defendants as to both the complaint and the answer, in a suit to restrain them from interfering with plaintiff's telephone pole and from interfering with the erection of a new one, the defense being that such pole obstructed defendants' enjoyment of their property, and the decree merely forbade defendants from interfering with the existing pole, but forbade the plaintiff from erecting a new one, a motion to modify such decree so as to allow the plaintiff to erect a new pole should be sustained.

New Long Distance Tel. Co. v. White, 382, 387 (3).

4. *Taxpayers.—Void Payments by Towns.—Failure to File Claim for Statutory Time.—Complaint.*—A complaint by taxpayers of a town alleging that the town board unlawfully allowed to defendant claimant \$400 for legal services, that no claim therefor was filed five days before the session of the board at which it was allowed, that such allowance was deposited in defendant bank, and praying that the bank be enjoined from paying such money to claimant and that it be ordered to return it to the town, is sufficient.

Campbell v. Brackett, 293, 294 (2).

5. *Trade-Names.—Unfair Competition.—Complaint.*—A complaint by the "Computing Cheese Cutter Company" alleging that the defendants under the name of "Anderson Cheese Cutter Company" conspired to deprive the plaintiff of its business, that they "are deceiving the public and plaintiff's customers, thereby securing orders and profits intended for the plaintiff," and are wrongfully obtaining letters containing orders intended for the plaintiff, to plaintiff's damage, states a cause of action. Constock, P. J., and Rabb, J., dissenting.

Computing Cheese Cutter Co. v. Dunn, 20, 27 (8).

INSANITY—

Nonexpert evidence as to, see **WITNESSES**, 1; *Wiseman v. Gouldsberry*, 677, 679 (3).

INSOLVENCY—

See **CORPORATIONS**.

Appellate Court will not weigh conflicting evidence as to, see **APPEAL**, 50; *Pahde v. Pate*, 146.

INSTRUCTIONS—

See APPEAL; TRIAL.

INSURANCE—

Evidence in cases of, see EVIDENCE.

1. *Contract.—Policy.—Notes.*—The policy and the premium notes constitute the contract between the company and assured.
Equitable Life Assur. Soc., etc., v. Stough, 411, 414 (3).
2. *Beneficiaries.—Vested Rights.*—A policy giving to the assured the right to change his beneficiary does not give such beneficiary a vested right.
Equitable Life Assur. Soc., etc., v. Stough, 411, 414 (1).
3. *Policies.—Mutual Abrogation.*—A policy giving no vested right to the beneficiary may be abrogated by the mutual consent of assured and the company.
Equitable Life Assur. Soc., etc., v. Stough, 411, 414 (2).
4. *Policy.—Cancellation.*—Where assured delivered up his policy to the company's local agent and obtained his premium note, his policy ceases to be binding, although the company, at its home office, without knowledge of the facts, has issued a short rate premium for the time the policy was outstanding.
Equitable Life Assur. Soc., etc., v. Stough, 411, 415 (4).
5. *Policy.—Notes.—Estoppel.*—Where a policy is surrendered and the premium note canceled no action can be supported on the policy, and the company is estopped to maintain an action on the note. *Equitable Life Assur. Soc., etc., v. Stough, 411, 415 (5).*
6. *Policies.—Voidable.—Answer.*—In an action on a fire policy, an answer alleging that the assured, contrary to the company's rules of which he had knowledge, placed oil and gasoline in his barn, that he left stoves burning in such barn, and that such stoves set the barn on fire, thereby destroying it, is insufficient, there being no showing of a rescission of the contract because of the alleged breach, or any return, or offer of return, of the premiums or assessments received. *Farmers, etc., Ins. Co. v. Hill, 605, 607 (2).*
7. *Fire Policies.—Violation of Rules by Assured.—Negligence.—Wilfulness.—Answer.*—An answer, in a fire insurance case, that the plaintiff placed gasoline and oil stoves in the insured barn, and that he negligently and carelessly left them burning, in violation of his contract, and that he "wilfully and carelessly" left them burning, by reason whereof the barn was destroyed, does not show a wilful or intentional burning of the barn, and is therefore insufficient. *Farmers, etc., Ins. Co. v. Hill, 605, 608 (3).*
8. *Mutual Benefit Societies.—Suicide Clauses.—Sane or Insane.*—A mutual benefit certificate providing that "no benefit shall be paid in case the member commits suicide, within five years, whether sane or insane," does not insure against hanging while insane. *Kunse v. Knights, etc., 30, 33 (1).*
9. *Policies.—Conditions.—Suicide.*—Mutual benefit associations have the right to exclude from their risks liability for self-destruction, sane or insane. *Kunse v. Knights, etc., 30, 35 (2).*
10. *Beneficial Associations.—Tender of Dues.—Refusal.—Complaint.*—A complaint alleging that the assured tendered to the authorized local secretary of defendant beneficial association "all moneys and assessments due" for a certain month, which he refused to accept, sufficiently shows a tender.
Supreme Tent, etc., v. Fisher, 419, 422 (2).

INSURANCE—Continued.

11. *Beneficial Associations.—Dues.—Legal Enforcement of Payment of.*—A member of a beneficial association can not be compelled to pay his dues. *Supreme Tent, etc., v. Fisher*, 419, 426 (4).
12. *Beneficial Associations.—Nonpayment of Dues.—Change of Employment.*—Where a member of a beneficial order engages in an extra-hazardous employment and fails to pay his dues therefor, he is legally suspended, although there was a controversy over the matter between him and the local secretary; and the reasonableness of the by-law in reference to such extra hazard is not involved. *Supreme Tent, etc., v. Fisher*, 419, 426 (5).
13. *Beneficial Associations.—Policies.—Performance of Conditions.—Complaint.*—A complaint setting out the policy issued to assured in favor of the plaintiff beneficiary, and alleging that defendant association refused to furnish blanks for making proofs of death, and refused to accept proofs of death, and that the assured and the beneficiary had performed all of the conditions on their parts, is sufficient. *Supreme Tent, etc., v. Fisher*, 419, 422 (1).

INTENTION—

See WILLS.

INTEREST—

Person knowingly borrowing money belonging to bastard child. Liable for interest thereon, see BASTARDY, 5; *Lewis v. Hershey*, 104, 109 (7).

Heir not entitled to, where he is to blame for not receiving share. see EXECUTORS AND ADMINISTRATORS, 7; *Fletcher v. Nicholson*, 375, 377 (3).

Judgment.—Remittitur.—Where a party relies upon a judgment of a certain date as the foundation of its claim, it should be allowed interest only from such date; and an excessive allowance may be ordered remitted on appeal, or a new trial may be granted.

Dodge v. Lake Shore, etc., R. Co., 281, 283 (6).

INTERROGATORIES—

See TRIAL.

INTERSTATE COMMERCE—

See COMMERCE; COURTS.

INTERURBAN RAILROADS—

See CARRIERS; RAILROADS.

INTOXICATING LIQUORS—

See NUISANCE.

Complaint for maintenance of saloon nuisance. see NUISANCE, 10; *Joseph Schlitz Brewing Co. v. Shiel*, 623, 624 (1).

1. *Illegal Sales.—Loss of Support.—Proximate Cause.—Instructions.*—An instruction that before there can be a recovery for loss of support caused by the illegal sale of liquors it must be shown that such sale was the proximate cause of such loss, is erroneous. *State, ex rel., v. Dudley*, 674, 675 (1).

INTOXICATING LIQUORS—Continued.

2. *Illegal Sales.—Loss of Support.—Proximate Cause.—Conflicting Instructions.*—Certain instructions that the alleged illegal sale of liquors must, to warrant a recovery for loss of support, be the proximate cause of such loss, are not cured by others stating that a recovery is warranted, if such sale was the direct or remote result of such loss. *State, ex rel., v. Dudley*, 674, 676 (3).

JUDGMENT—

See EXECUTION.

When appealable, see APPEAL, 3-6.

Based upon incompetent evidence will be reversed, see APPEAL, 64; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (4).

May be ordered on appeal, see APPEAL, 66; *New Long Distance Tel. Co. v. White*, 382, 387 (4).

For all costs accruing after a certain date includes costs of a reversal in Supreme Court, see COSTS, 2; *Dodge v. Lake Shore, etc., R. Co.*, 281, 283 (3).

For alimony, motion to modify is proper method of presenting question of, on appeal, see DIVORCE, 5; *Boggs v. Boggs*, 397, 400 (5).

Decree forbidding interference with an old telephone pole, modified so as to permit erection of a new one, see INJUNCTION, 3; *New Long Distance Tel. Co. v. White*, 382, 387 (3).

Interest computed from date of, see INTEREST; *Dodge v. Lake Shore, etc., R. Co.*, 281, 283 (6).

Motion to modify excessive recovery not necessary, where motion for new trial presents such reason, see NEW TRIAL, 3; *Baker v. Anderson Tool Co.*, 619, 621 (2).

Ordering "free access" to depot, violation of, see RAILROADS, 1-3; *Pittsburgh, etc., R. Co. v. Town of Remington*, 561.

Motion to modify judgment on set-off, see SET-OFF AND COUNTERCLAIM; *Doering v. Davenport*, 465, 468 (3).

1. *Defective.—Motion to Modify.*—The remedy for the erroneous rendition of a personal judgment, in a foreclosure suit, is a motion to modify. *Vancelef v. Britton*, 388, 390 (4).

2. *Review of.—Necessity of Showing Error.—Complaint.*—A complaint to review a decree, that fails to disclose any objection or exception to erroneous rulings therein, is not sufficient, such proceeding being in the nature of an appeal, the trial being by the record alone. *Myer v. Minch*, 495, 497 (4).

3. *Excessive.—Validity.*—An excessive decree, where jurisdiction exists, is not void. *Myer v. Minch*, 495, 497 (3).

4. *Jurisdiction.—Presumptions.—Mortgages.—Foreclosure.*—Where the parties to a foreclosure suit in the circuit court appear and answer, the decree entered cannot be attacked for want of jurisdiction, jurisdiction of the persons being shown by their appearances, and jurisdiction of the subject-matter being presumed. *Myer v. Minch*, 495, 497 (1).

5. *Court Proceedings.—Presumptions.*—The judgment and other proceedings of a court, are presumed to be proper. *Myer v. Minch*, 495, 497 (2).

6. *Res Judicata.—Parties.*—A judgment is not binding upon a person who was neither a party nor privy to such judgment. *Bottorff v. Bottorff*, 692 (1).

JUDGMENT—Continued.

7. *Final*.—Where a judgment was rendered in favor of some of the defendants on January 9, and for the remaining one on March 26, an appeal taken on the following January 23, is in time, the judgment being final as to all parties on March 26.
Ragle v. Dedman, 693, 695 (2).
8. *Costs*.—*Finality*.—A judgment ordering that "all costs after November 7, 1893, be and the same are hereby taxed to" plaintiff's decedent, is complete and final.
Dodge v. Lake Shore, etc., R. Co., 281, 283 (1).
9. *Partition*.—*Title*.—*Childless Second Wife*.—*Heirs of*.—In a suit, for partition, by a childless second wife against the descendants of a child of her husband by a former marriage, including the husband of a deceased daughter, a decree dividing the land and providing that the plaintiff shall hold the fee of a certain part and that such part should descend to such children, or their descendants, as such widow's forced heirs, gives to such husband no right as an heir.
Dodd v. Shanton, 377, 382 (6).
10. *Foreign*.—*Jurisdiction*.—*Collateral Attack*.—A foreign judgment may always be questioned for want of jurisdiction, and a sister-state judgment is foreign within this rule.
Citizens State Bank v. Read, 158, 159 (1).
11. *Foreign*.—*Complaint upon*.—A complaint upon a foreign judgment, specifically setting out the manner of obtaining jurisdiction, must affirmatively show such jurisdiction, or relief will be denied.
Citizens State Bank v. Read, 158, 160 (2).
12. *Foreign*.—*Rendition by Clerk*.—*Complaint*.—A complaint upon a foreign judgment alleging that such judgment was rendered by a court of general jurisdiction is not sustained where the record shows that said judgment was rendered by the clerk of said court.
Citizens State Bank v. Read, 158, 160 (4).

JUDICIAL NOTICE—

See EVIDENCE.

JURISDICTION—

See APPEAL; COURTS; JUDGMENT; JUSTICES OF THE PEACE; REMOVAL OF CAUSES.

In bankruptcy cases, see BANKRUPTCY.

JURY—

See EVIDENCE.

Sufficiency of evidence in action on note, question for, see BILLS AND NOTES, 11; *Poetker v. Tindle*, 455, 456 (2).

Reasonableness of time for lighting a station platform, question for, see CARRIERS, 19; *Cleveland, etc., R. Co. v. Harvey*, 153, 156 (5).

Instruction detailing facts constituting negligence, not an invasion of province of, see CARRIERS, 41; *Indiana Union Traction Co. v. Ohne*, 632, 634 (1).

Negligence and contributory negligence as to alighting from train, questions for, see CARRIERS, 43; *Lake Erie, etc., R. Co. v. Cotton*, 580, 585 (3).

Delivery, a question for, see DEEDS, 11; *Pethel v. Pethel*, 664, 667 (1).

JURY—Continued.

Contributory negligence, question for, see MASTER AND SERVANT, 23, 41; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 249 (27), *Miami Coal Co. v. Kane*, 391, 396 (6).

Whether a section hand should have looked and listened for an approaching train, question for, see MASTER AND SERVANT, 47; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 248 (24).

Whether the particles that flew into plaintiff's eye were "dust," question for, see MASTER AND SERVANT, 56; *Indianapolis Foundry Co. v. Bradley*, 530, 534 (4).

Contributory negligence of fireman, question for, see NEGLIGENCE, 14; *Beaning v. South Bend Electric Co.*, 261, 260 (13).

Questions of negligence and contributory negligence for, see RAILROADS, 30, 35.

Whether father entrusting a team to son was contributorily negligent, question for, see RAILROADS, 35; *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401, 408 (8).

Verdict can be directed only where there is no evidence, see TRIAL, 3; *Beaning v. South Bend Electric Co.*, 261, 267 (3).

Manner of assessment of damages by, on demurrer to evidence, see TRIAL, 7; *Pluskett v. Benton-Warren, etc., Soc.*, 358, 360 (1).

Credibility of witnesses, question for, see WITNESSES, 4; *Pethtel v. Pethtel*, 664, 670 (5).

Verdict.—Equitable and Legal Issues.—Set-Off.—Where a case involving both legal and equitable issues is submitted without objection to the jury for trial, the verdict is binding upon all parties until properly set aside, and the judge has no right to adjudicate that a right of set-off exists, where the verdict is silent thereon. *Todd v. Mills*, 471, 473 (1).

JUSTICES OF THE PEACE—

Sufficiency of complaint before, for tenant's holding over, see LANDLORD AND TENANT, 5; *Brown v. Thompson*, 188, 189 (1).

Complaint before, against railroad company, see RAILROADS, 21; *Cleveland, etc., R. Co. v. Moore*, 58, 59 (1).

Jurisdiction.—Landlord and Tenant.—Holding over.—Justices of the peace have jurisdiction over actions to recover possession as against tenants unlawfully holding over. *Brown v. Thompson*, 188, 192 (5).

LABOR—

See WORK AND LABOR.

LACHES—

Questioning Appointment of Receiver.—Corporations.—Three and one-half months is not an unreasonable time for fifty-nine stockholders to use in preparing to set aside a receivership obtained through the fraud of certain stockholders and the directors of a corporation. *Thayer v. Kinder*, 111, 115 (8).

LANDLORD AND TENANT—

See COVENANTS.

Rentals under gas and oil contracts, see CONTRACTS.

Justices of the peace have jurisdiction over actions for possession, see JUSTICES OF THE PEACE; *Brown v. Thompson*, 188, 192 (5).

1. *Leases.—Holding over.—“Refusal of Premises.”*—A lease giving to the lessee “the first refusal of the premises for another five years” gives him an option for renting the premises for five years longer at the same terms. *C. Callahan Co. v. Michael*, 215, 218 (1).

2. *Extensions.—Options.—Holding over.—Notice.*—A tenant having an option on an extension of his lease for a definite time and who merely holds over, thereby becomes bound for the additional term, notice of the tenant’s intention to hold not being required unless stipulated for in the lease.

C. Callahan Co. v. Michael, 215, 219 (2).

3. *Leases.—Right to a Renewal.—Holding over.*—Where a lease, by clear and explicit language, gives to the lessee a right to a renewal at the expiration of the lease, the mere holding over of such lessee is not sufficient to show an election to renew.

C. Callahan Co. v. Michael, 215, 219 (3).

4. *Leases.—Extensions.—Holding over.*—A lease giving to the lessee “the first refusal of said premises for another term of five years, upon the same terms and conditions as expressed in this lease, except as to the amount of rent to be paid, which said lessor is to fix,” gives to the lessee a right to hold over without notice, and thus secure the extended term of five years, and the lessor’s acceptance of the same rent for the first quarter of the first year after the expiration of the first term fixes the rent for the subsequent term. *C. Callahan Co. v. Michael*, 215, 220 (4).

5. *Justices of the Peace.—Complaints before.—Sufficiency.*—A complaint before a justice of the peace is sufficient if it apprises the defendant of the nature of the plaintiff’s demand, and states facts sufficient to bar another action for the same cause.

Brown v. Thompson, 188, 189 (1).

6. *Complaint before Justice of the Peace.*—A complaint before a justice of the peace, alleging that the plaintiff’s lessor rented to the defendant, for two years, a certain room in her hotel, that defendant took and now holds possession thereof, that the rent was payable monthly in advance and defendant failed to pay it, that defendant unlawfully holds possession of such room, that the plaintiff leased such building including the room rented to defendant, to defendant’s knowledge, and that plaintiff is damaged in the sum of fifty dollars, states a cause of action.

Brown v. Thompson, 188, 190 (2).

7. *Rent.—Failure to Pay.*—A tenant who agrees to pay in advance a stipulated sum, as rent, on the first day of each month, and who fails to do so, holds over unlawfully, such failure having determined his tenancy. *Brown v. Thompson*, 188, 191 (4).

8. *Unlawfully Holding over.—Gist of Action.*—In actions to recover possession of leased premises unlawfully held by tenants, the wrongful possession is the gist of the action.

Brown v. Thompson, 188, 191 (3).

LAST CLEAR CHANCE—

See RAILROADS, 22.

LEASES—

See COVENANT; LANDLORD AND TENANT.

LEGACIES—

See WILLS.

LETTERS—

May constitute contract, see CONTRACTS, 3; *Jennings v. Shertz*, 120, 125 (1).

LEVY—

See EXECUTION.

LICENSES—

See PHYSICIANS AND SURGEONS

LIENS—

See MECHANICS' LIENS.

Illegal tax deeds constitute, see DEEDS, 4; *Ellison v. Branstrator*, 307, 313 (9), 314 (9).

For taxes, superior to drainage liens, see TAXATION; *Ellison v. Branstrator*, 307, 313 (8).

Of vendor, ordinarily waived by accepting collateral security, see VENDOR AND PURCHASER, 12, 13; *Buffalo, etc., Quarries Co. v. Davis*, 116.

LIMITATION OF ACTIONS—

Amended complaint, when affected by, see MASTER AND SERVANT, 35; *Raley v. Evansville Gas, etc., Co.*, 649, 655 (4), 657 (4).

Effect of amended complaint on, see PLEADING, 15, 16; *Raley v. Evansville Gas, etc., Co.*, 649.

Runs against trustee for child only upon an unequivocal repudiation of the trust, see TRUSTS, 3; *Lewis v. Hershey*, 104, 108 (5).

1. *Infants.—Statutes.*—Infants have two years after attaining twenty-one years of age in which to maintain actions which would ordinarily have been barred (§298 Burns 1908, §296 R. S. 1881). and if the defendant dies during such two-year period, the time is extended eighteen months from the time of death, less the unexpired portion of such two-year period (§300 Burns 1908, §298 R. S. 1881).
Lewis v. Hershey, 104, 109 (6).

2. *Damages.—Railroads.*—Twenty years' use of a street by a railroad company bars a right of action by frontagers for damages.
Chicago, etc., R. Co. v. Johnson, 162, 171 (10).

3. *Administrators' Sales of Real Estate.*—A suit by a party for the recovery of real estate sold by an administrator must be brought within five years after the confirmation of such sale (§295 Burns 1908, subd. 4, §293 R. S. 1881), even though the sale was void.
Hampton v. Murphy, 513, 521 (8).

MAIL—

Diversion of, see FRAUD.

MARRIED WOMEN—

See HUSBAND AND WIFE.

MASTER AND SERVANT.

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See EVIDENCE; NEGLIGENCE; PLEADING; RAILROADS; TRIAL.

I. MASTER'S LIABILITY FOR INJURIES TO SERVANTS.

(A) NATURE AND EXTENT.

1. *Factory Act.*—"Dust."—"Dust" ordinarily imports fine, dry particles of earth or other matter capable of being carried by the wind. *Indianapolis Foundry Co. v. Bradley*, 530, 533 (2).
2. *Factory Act.*—*Negligence.*—*Concurrent Proximate Causes.*—Where a master's negligence concurs with a fellow servant's in producing an injury to another servant, such master is liable. *Cook v. Ormsby*, 352, 355 (4).

(B) WAYS, WORKS AND APPLIANCES.

3. *Safe Place.*—*Rules.*—*Delegation of Duties.*—A master must use ordinary care to provide for his servants a safe place in which to work, and safe appliances with which to work, and should adopt reasonable rules for the conduct of the work; and these duties cannot be delegated. *Knickerbocker Ice Co. v. Smith*, 445, 449 (4).
4. *Unsafe Place.*—*Obvious Defects.*—*Use of Faculties.*—A servant is required to use his faculties to discern and avoid obvious defects and dangers. *McLette v. Indianapolis, etc., Traction Co.*, 88, 94 (2).
5. *Obvious Dangers.*—*Ice and Sleet.*—*Railroads.*—*Trestles.*—A servant is conclusively presumed to know that a wet railroad trestle will be covered with ice and will be slippery when the temperature is at zero. *McLette v. Indianapolis, etc., Traction Co.*, 88, 94 (4).
6. *Latent Defects.*—*Rain.*—*Ice.*—*Snow.*—A servant who knows of a rain immediately followed by zero weather and a snow, is conclusively presumed to know that there will be ice under the snow, causing exposed objects to be slippery. *McLette v. Indianapolis, etc., Traction Co.*, 88, 95 (5).
7. *Defective Machinery.*—*Proximate Cause.*—The failure to use a different kind of a machine can be only a remote or speculative cause of an injury sustained because of a defect in the machine actually used. *Indiana Match Co. v. Kennedy*, 627, 631 (1).
8. *Factory Act.*—*Dangerous Machinery.*—*Failure to Guard.*—*Negligence.*—The master's failure to guard dangerous machinery, where it is possible to do so, constitutes negligence *per se*. *Cook v. Ormsby*, 352, 354 (1).
9. *Factory Act.*—*Common Law.*—Section 8029 Burns 1908, Acts 1899, p. 231, §9, compelling employers to guard dangerous machinery extends the common-law duty of masters as to furnishing safe places, works and machinery. *Cook v. Ormsby*, 352, 354 (2).
10. *Factory Act.*—*Emery-Wheels.*—"Dust."—The word "dust," as used in §8029 Burns 1908, Acts 1899, p. 231, §9, requiring factory

MASTER AND SERVANT—Continued.

owners to provide proper exhaust-fans to carry away the "dust" created, includes particles of emery and iron, where iron is being ground on an emery wheel.

Indianapolis Foundry Co. v. Bradley, 530, 533 (3), 534 (3).

(C) METHODS, RULES AND ORDERS.

11. *Negligence.—Specific Orders.*—A master who gives to his servant a specific order, leaving to the servant no discretion, is liable for resultant injuries, unless the danger is so glaring that an ordinarily prudent person would not incur it.

Mellette v. Indianapolis, etc., Traction Co., 88, 96 (7).

12. *Specific Orders.—Complaint.*—A complaint alleging that "defendants ordered and directed that plaintiff and his crew proceed in the work of constructing such bridge and trestle," does not show an order so specific as to make the defendants liable to a servant who fell from the trestle which was covered with ice.

Mellette v. Indianapolis, etc., Traction Co., 88, 97 (8).

13. *Obvious Dangers.—Warning.*—A master is not required to warn his servant against obvious dangers.

Mellette v. Indianapolis, etc., Traction Co., 88, 98 (11).

(D) FELLOW SERVANTS.

14. *Use of Tools.—Delegation of Master's Duty.*—A master may delegate to fellow servants his duty as to the proper handling of appliances furnished, and thereby free himself from all liability for negligence therein.

Knickerbocker Ice Co. v. Smith, 445, 450 (5).

15. *Negligence of.*—A master is not liable for the negligence of fellow servants.

Knickerbocker Ice Co. v. Smith, 445, 450 (5).

(E) ASSUMPTION OF RISK.

16. *Defects.—Reliance upon Performance of Duty.*—A servant is conclusively presumed to know of obvious, but not latent defects; and the master is required to ascertain and remove latent defects, the servant having a right to rely upon the master's superior knowledge as to such defects.

Mellette v. Indianapolis, etc., Traction Co., 88, 94 (3).

17. *Known Defects.*—A railroad construction foreman who goes upon a trestle knowing it to be covered with ice assumes the risk of slipping therefrom, although he slips in less than a minute after going upon such trestle.

Mellette v. Indianapolis, etc., Traction Co., 88, 95 (6).

18. *Railroads.—Repairing Tracks.*—A servant employed to remedy defects in a railroad track, or in constructing a new track, assumes the risks of such defects, or the dangers of derailling cars on such new track, while engaged in such repair or construction.

Southern R. Co. v. Bufkins, 80, 82 (4).

19. *Engineers.—Negligence of.*—A section hand does not assume the risk of the negligence of an engineer in running an engine, section one of the employers' liability act (Acts 1893, p. 294, §8017 Burns 1908) placing such burden upon the company.

Pittsburgh, etc., R. Co. v. Rogers, 230, 241 (12).

(F) CONTRIBUTORY NEGLIGENCE.

20. *Coal Mines.—Violation of Rules or Law by Servant.*—The violation of a rule by a servant, which contributes to such servant's injury, prevents a recovery by such servant.

Miami Coal Co. v. Kane, 391, 395 (4).

MASTER AND SERVANT—Continued.

21. *Violation of Statutes or Rules.—Proximate Cause.*—The violation of a statute, or the rule of his master, by the servant, precludes a recovery of damages by him, where such violation was the proximate cause of the injury.

Miami Coal Co. v. Kane, 391, 395 (5).

22. *Railroads.—Violation of Ordinance.—Section Hands.—Avoidance of Injury.—Question for Jury.*—Whether a section hand who was working on defendant railroad company's track within the corporate limits of a city was guilty of contributory negligence in failing to see a train approaching at a rate of speed in violation of a city ordinance, and whether he would have been able to avoid injury if the speed of the train had been within the ordinance rate, are questions for the jury.

Pittsburgh, etc., R. Co. v. Rogers, 230, 243 (15).

23. *Railroads.—Violation of Ordinance.—Section Hands.—Question for Jury.*—Whether a section hand working upon a railroad track within a city was guilty of contributory negligence in failing to turn around from his work and see an approaching train running in excess of the ordinance rate is a question for the jury.

Pittsburgh, etc., R. Co. v. Rogers, 230, 249 (27).

(G) ACTIONS.

24. *Assumption of Risk.—Negating.—Complaint.*—A complaint by the representative of a servant killed by a railroad company must negative the servant's assumption of the risk causing his death.

Pittsburgh, etc., R. Co. v. Rogers, 230, 241 (11).

25. *Railroads.—Negating Contributory Negligence.—Complaint.*—A complaint alleging that the decedent was struck by one of defendant's trains without negligence on his part, negatives contributory negligence.

Pittsburgh, etc., R. Co. v. Rogers, 230, 241 (10).

26. *Safe Place.—Complaint.*—A complaint for injuries received by a servant because of an unsafe working place must show that the danger was one that inhered in the place, or machinery or appliances furnished, and not to the manner of doing the work.

Knickerbocker Ice Co. v. Smith, 445, 449 (3).

27. *Injury to Fellow Servant.—Complaint.—Allegation that "Defendant" was Negligent.*—A complaint alleging specifically that the plaintiff's fellow servant negligently operated the dipper by which plaintiff was injured, and also that "defendant" company did so, shows that the injury was caused by the act of such fellow servant.

Knickerbocker Ice Co. v. Smith, 445, 449 (1).

28. *Fellow Servants.—Negligence.—Complaint.*—A complaint showing that the plaintiff, while at his customary place, was injured by the fall of a sand and gravel dipper, that the defendant negligently failed to establish any rules for the operation of such dipper, that such dipper was ordinarily dumped after each dip, but that on the occasion in question, without any warning or notice thereof to the plaintiff, it was negligently dipped a second time without its being dumped, thereby injuring the plaintiff, does not state a cause of action.

Knickerbocker Ice Co. v. Smith, 445, 451 (7).

29. *Several Acts of Negligence.—Proof of One.—Complaint.*—Where several acts of negligence are alleged to be the proximate cause of a servant's injuries, proof of one of such acts will sustain a recovery, unless the pleading proceeds upon the theory that all the alleged acts of negligence combined caused the injury.

Indiana Match Co. v. Kennedy, 627, 631 (2).

MASTER AND SERVANT—Continued.

30. *Several Acts of Negligence.—Proximate Cause.—Complaint.*—A complaint alleging that the plaintiff's injuries were the proximate result of defendant's negligence in maintaining the gear of a machine in a specified, defective condition, and in maintaining a gearing that was dangerous and unsafe, is sustained by proof of the existence of one of such allegations of negligence.

Indiana Match Co. v. Kennedy, 627, 631 (3).

31. *Railroads.—Violation of Ordinance.—Fellow Servants.*—A complaint alleging that defendant railroad company negligently ran its train through a certain city in violation of a speed ordinance, thereby killing the plaintiff's decedent, who was a section hand, is not sufficient at the common law.

Pittsburgh, etc., R. Co. v. Rogers, 230, 236 (3).

32. *Railroads.—Failure to Ring Bell.—Complaint.*—An allegation that defendant railroad company negligently ran its train against plaintiff's decedent "without giving him warning of approach by sounding the whistle or ringing the bell," does not show negligence, there being no averment that such company knew or should have known of the decedent's peril.

Pittsburgh, etc., R. Co. v. Rogers, 230, 239 (7).

33. *Railroads.—Violation of Speed Ordinance.—Death.—Proximate Cause.—Complaint.*—A complaint alleging that defendant railroad company negligently ran its train through a city in violation of the speed ordinance thereby killing a section hand who was working on the track, sufficiently shows that the violation of the ordinance was the proximate cause of such killing.

Pittsburgh, etc., R. Co. v. Rogers, 230, 240 (8).

34. *Railroads.—Violation of Ordinance.—Complaint.—Recitals.*—A complaint alleging that defendant railroad company negligently ran its train through a city at the rate of thirty miles per hour "contrary to and in violation of * * * an ordinance * * * of said city * * * which was on said date in full force and effect," sufficiently shows that such ordinance was in force at such time.

Pittsburgh, etc., R. Co. v. Rogers, 230, 240 (9).

35. *Electric Light Companies.—Failure to Insulate.—Amended Complaint.—Failure to Turn Off Current.—Limitation of Actions.*—Where a servant, in an original complaint, alleged that defendant electric light company negligently failed to insulate its wires, thereby injuring him, his subsequent amendment of such complaint by adding the averment that such company negligently failed to turn off the current from its wires, thereby injuring him, does not introduce a new cause of action against which the statute of limitations would constitute a bar, since the facts alleged in either complaint would bar another action for the same cause.

Raley v. Evansville Gas, etc., Co. 649, 655 (4), 657 (4).

36. *Electric Light Company.—Failure to Insulate.—Complaint.*—A complaint alleging that defendant electric light company negligently failed to insulate its wires, that it knew thereof and the plaintiff lineman did not, and that in performing his work the plaintiff was injured thereby, states a cause of action.

Raley v. Evansville Gas, etc., Co. 649, 658 (9).

37. *Employers' Liability Act.—Complaint.*—A complaint founded upon section one of the employers' liability act (Acts 1893, p. 294, §8017 Burns 1908) must affirmatively allege facts bringing the plaintiff within such act.

Pittsburgh, etc., R. Co. v. Rogers, 230, 239 (4).

MASTER AND SERVANT—Continued.

38. *Employers' Liability Act.—Railroads.—Operating Trains.—Line of Duty.—Complaint.*—Since a railroad company can operate trains only by employing servants, an allegation that defendant railroad company negligently ran its train, killing plaintiff's decedent, imports that defendant's servant in charge of the engine and while in the line of his duty, ran such train.
Pittsburgh, etc., R. Co. v. Rogers, 230, 239 (6).
39. *Employers' Liability Act.—Railroads.—Engineers.—Section Hands.—Violating Ordinance.—Complaint.*—A complaint alleging that defendant railroad company negligently ran its train in violation of a city ordinance, thereby killing one of its section hands, states a cause of action under section one of the employers' liability act (Acts 1893, p. 294, §8017 Burns 1908).
Pittsburgh, etc., R. Co. v. Rogers, 230, 242 (13).
40. *Factory Act.—Unguarded Saw.—Acts of Fellow Servant.—Complaint.*—A complaint alleging that defendants instructed the plaintiff to work at an unguarded saw, that such saw could have been guarded without impairing its usefulness, that a fellow servant pushed or pinched him, causing him involuntarily to thrust his hand into such saw, to his injury, states a cause of action.
Cook v. Ormsby, 352, 355 (3).
41. *Coal Mines.—Statutes.—“Unsafe Place.”—Contributory Negligence.—Question for Jury.*—Whether a servant is guilty of contributory negligence in failing to notify the mine boss of an “unsafe place” (§8580 Burns 1908, Acts 1905, p. 65, §12), of which he has knowledge, or in remaining in an “unsafe place,” after notice, is a question for the jury.
Miami Coal Co. v. Kane, 391, 396 (6).
42. *Factory Act.—Emery-Wheels.—Dust.—Burden of Proof.*—In an action by a servant against his master for the injury of an eye by dust from an emery-wheel, the burden is upon the plaintiff to prove that he was a servant, that he was operating an emery-wheel not properly provided with an exhaust-fan, that it was practicable to provide such exhaust-fan, and that the injury occurred in the manner alleged.
Indianapolis Foundry Co. v. Bradley, 530, 532 (1).
43. *Burden of Proof.—Contributory Negligence.*—An instruction that the burden is upon the plaintiff to establish the defendant's negligence, and that under a general denial the defendant may prove the servant's contributory negligence, but that the burden of proving contributory negligence is upon the defendant, is correct.
Pittsburgh, etc., R. Co. v. Rogers, 230, 247 (20).
44. *Contributory Negligence.—Effect.—Instructions.*—An instruction that contributory negligence on the part of the servant will preclude a recovery by him though the master was guilty of negligence, is not erroneous.
Pittsburgh, etc., R. Co. v. Rogers, 230, 247 (21).
45. *Contributory Negligence.—Proof of.—Instructions.*—An instruction that the burden is upon the master to prove the servant's contributory negligence and that if the evidence introduced by the servant should show that, by the use of ordinary care, such servant could have avoided the injury, then the servant cannot recover, is favorable to the master.
Pittsburgh, etc., R. Co. v. Rogers, 230, 248 (22).
46. *Railroads.—Violation of Ordinance.—Section Hands.—Injuries.—Instructions.*—An instruction that the ordinance admitted in

MASTER AND SERVANT—Continued.

evidence was in force at the time of decedent's injury, and that if defendant railroad company run its trains in violation thereof, thereby killing the decedent who at the time was in the exercise of due care, such company would be liable, is correct.

Pittsburgh, etc., R. Co. v. Rogers, 230, 248 (23).

47. *Railroads.—Ordinances.—Obedience to.—Presumptions.—Contributory Negligence.—Questions for Jury.—Instructions.*—An instruction that a section hand had a right to assume that defendant railroad company would obey the speed ordinance of the city wherein he was working and that whether the section hand should have looked and listened for an approaching train is a question for the jury, is correct.

Pittsburgh, etc., R. Co. v. Rogers, 230, 248 (24).

48. *Railroads.—Section Hands.—Engineer's Assumption of Clear Track.—Instructions.*—An instruction that the engineer of a train alleged to have been run through a city in violation of an ordinance, thereby killing a section hand, had a right to assume that such hand would get off the track, is properly refused.

Pittsburgh, etc., R. Co. v. Rogers, 230, 249 (25).

49. *Railroads.—Section Hands.—Contributory Negligence.—Instructions.*—An instruction that if the decedent section hand's view of the track was unobstructed and he failed to see the defendant's train, alleged to have been run at a speed in excess of the city ordinance, in time to get off the track, plaintiff cannot recover, is properly refused.

Pittsburgh, etc., R. Co. v. Rogers, 230, 249 (26).

50. *Changing Work.—Injuries.—Complaint.—Paragraphs.—Instructions.—Interrogatories.*—The refusal of the judge to instruct on a paragraph of complaint alleging that defendant negligently ordered the plaintiff to perform certain work outside of the scope of his employment, by reason whereof he was injured, is not prejudicial, where the answers to the interrogatories, as well as the evidence, show that the plaintiff, at his own request, changed his work.

Dunlap v. Indiana Union Traction Co., 347, 349 (3).

51. *Assumption of Risk.—Danger.—Knowledge or Comprehension of.—Instructions.*—An instruction that a servant assumed the risk of danger when he "knew" thereof and continued in the employment, is not prejudicial for its failure to state that such servant should also "comprehend" the danger.

Dunlap v. Indiana Union Traction Co., 347, 350 (5).

52. *Complaint.—Instructions as to Negligence Not Alleged.*—Where no negligence was alleged as to the fastening of wire upon a spool, in the unwinding of which the plaintiff was injured, an instruction which eliminates such negligence as a factor in the case, is not injurious.

Dunlap v. Indiana Union Traction Co., 347, 350 (6).

53. *Coal Mines.—Props.—Assumption of Risk.—Instructions.*—An instruction that a coal miner who works, knowing that the master has failed to furnish props or timbers with which to secure his roof, is not thereby precluded from a recovery for injuries sustained thereby, and that the risks assumed by the miner are those only which occur after the master has performed the duties imposed by law, is correct.

Miami Coal Co. v. Kane, 391, 393 (1).

54. *Coal Mines.—Imposed Duties.—Contributory Negligence.—Instructions.*—An instruction that the mining statute (§8580 Burns 1905, Acts 1905, p. 65, §12) was designed to protect miners not

MASTER AND SERVANT—Continued.

only from apparent, but also from remote and latent dangers, and that a miner injured because of a violation of such statute can recover therefor, unless he has notice of imminent or immediate danger, is not erroneous. *Miami Coal Co. v. Kane*, 391, 393 (2).

55. *Coal Mines.—Defective Roofs.—Notice.—Assumption of Risk.—Instructions.*—The refusal to give an instruction that if a servant in a coal mine knew of a defective and dangerous condition in the roof of his room and failed to notify the mine boss thereof, and continued to work in such defective and dangerous room, he cannot recover, is not prejudicial to defendant, where another instruction covered the subject of contributory negligence.

Miami Coal Co. v. Kane, 391, 394 (3).

56. *Factory Act.—Emery-Wheels.—Dust.—Instructions.—Question for Jury.—Verdict.—Jury.*—An instruction that the statute (§8029 Burns 1908, Acts 1899, p. 231, §9) requires that exhaust-fans for emery-wheels shall be of sufficient power to remove all dust, and that the jury must decide whether the alleged particles causing the injury complained of were "dust" within the meaning of the statute, is correct.

Indianapolis Foundry Co. v. Bradley, 530, 534 (4).

57. *Factory Act.—Emery-Wheels.—Dust.—Instructions.—Presumptions.—Verdict.—Jury.*—A general verdict for plaintiff in an action for injury to an eye caused by dust from an emery-wheel, is a finding that plaintiff's eye was injured by dust, and, in the absence of an instruction technically defining "dust," the presumption is that the jury understood the word in its ordinary sense.

Indianapolis Foundry Co. v. Bradley, 530, 534 (5).

58. *Specific Orders.—Interrogatories.—Answers to one interrogatory*, that defendants ordered the plaintiff to proceed to the top of an ice-covered trestle and put the stringers in position; to another, that defendant's order was as follows: "There are no new orders, the old orders still stand. Go ahead and push the work on the trestle on the island," and to others, that defendants, upon a request from plaintiff as to his work, ordered: "No, you keep on at that work. I want you to get it done as quickly as possible. I want you to hurry it up. Keep working at the trestle on the island. Push the work," do not show such a specific order as renders the master liable, where the servant, in obedience, went upon an ice-covered trestle and was injured thereby.

Mellette v. Indianapolis, etc., Traction Co., 88, 97 (9), 98 (9).

59. *Interrogatories.—Evidentiary Facts.*—An answer to an interrogatory, in an action by a servant against his masters, setting out verbatim the order given to the servant, states a fact, and not an evidentiary fact.

Mellette v. Indianapolis, etc., Traction Co., 88, 98 (10).

60. *Railroads.—Defective Track.—Interrogatories.*—In an action by a bridge carpenter who was riding on a hand-car and who was injured by reason of a low joint and rotten cross ties, answers to the interrogatories to the jury that he had been employed seven days, and that he had passed over the defect "several times," do not overturn a verdict for plaintiff, since neither actual nor constructive notice of the defect is shown.

Southern R. Co. v. Bufkins, 80, 81 (2).

61. *Railroads.—Defective Track.—Interrogatories.*—In an action by a bridge carpenter who was riding on a hand-car "on the Jasper branch," and who was injured by reason of a low joint and rotten cross-ties, answers to interrogatories to the jury showing

MASTER AND SERVANT—Continued.

that the roadbed between Jasper and Huntingburg was in process of reconstruction and that the bridges were being elevated to conform to grade and that the plaintiff was engaged on such bridges, do not overthrow a general verdict for the plaintiff, there being no finding that the plaintiff was assisting in work on the track.
Southern R. Co. v. Bufkins, 80, 81 (3), 83 (3).

II. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) ACTS OR OMISSIONS OF SERVANTS.

62. *Liability to Third Persons.*—The master is liable to third persons injured by the wrongs of his servant acting within the scope of his employment, though the particular act was not authorized.

Reeroth v. Holloway, 36, 39 (3).

63. *Scope of Employment.—Wrongful Acts.*—Wrongful acts committed by a servant in doing the thing authorized by the master subjects such master to liability therefor.

Reeroth v. Holloway, 36, 41 (4).

64. *Bailment.—Injuring Horse.—Scope of Employment.*—A company whose traveling salesman hired a horse to drive to Niles (ten miles away), and he drove to Buchanan (fourteen miles away), thereby fatally injuring the horse, is liable therefor, where the master's business required the salesman to go to Buchanan.

Reeroth v. Holloway, 36, 41 (5).

MAXIMS—

"That is certain which can be rendered certain," see **CONTRACTS**.
11; *Boyce v. Royal Store, etc., Co.*, 469 (1).

MECHANICS' LIENS—

1. *Oil Wells.—Coal Used in Sinking.—Judicial Notice.*—Under §8295 Burns 1908, Acts 1899, p. 569, providing that "all persons performing labor or furnishing material or machinery * * * may have a lien" upon the structure "for which they may have furnished material or machinery of any description, * * * to the extent of the value of any labor done, material furnished or either," a person who furnishes coal to an independent contractor to be used in generating power to sink an oil well, for defendant, has no right to a mechanic's lien upon such well or its fixtures, the court taking judicial notice that such coal did not actually become a part of such well or fixtures. *Haskell v. Gallagher*, 20 Ind. App. 224, overruled.

Niagara Oil Co. v. McBee, 576, 579 (1).

2. *Statutes.—Construction.*—The statute providing for the creation of mechanics' liens (§8295 Burns 1908, Acts 1899, p. 569) is strictly construed in determining what persons are entitled to the benefits thereof.

Niagara Oil Co. v. McBee, 576, 579 (2).

3. *Priorities. — Cross-Complaint. — Issues. — Special Findings.* — Where a complaint is filed for the foreclosure of a mechanic's lien, and the defendants severally file cross-complaints making the plaintiff and their respective codefendants defendants thereto, each alleging that the liens of the others are subordinate to his, a special finding that a named defendant, in writing, waived his priority in order that the owner might secure a loan from the defendant building and loan association, is within the issues.

Small v. Indianapolis Mortar, etc., Co., 160, 161 (1)

MERGER—

No merger, where justice requires titles to be kept separate, see DEEDS, 16; *Ellison v. Branstrator*, 307, 314 (10).

MINES AND MINERALS—

Actions for injuries in coal mines, see MASTER AND SERVANT.

MISTAKE—

Oral evidence, admissible to vary written contract in cases of, see EVIDENCE, 21; *McCaskey Register Co. v. Curfman*, 297, 304 (3).

MONEY HAD AND RECEIVED—

In bastardy case, belongs to child, see BASTARDY, 1; *Lewis v. Hershey*, 104, 106 (1).

MONEY PAID—

Complaint to recover, see WORK AND LABOR; *Wulschner-Stewart Music Co. v. Helft*, 428 (1).

MORALITY—

Reputation for, admissible in civil cases, as affecting credibility, see WITNESSES, 5; *Castle v. Clark*, 192, 195 (5).

MORTALITY TABLES—

See EVIDENCE, 7; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 244 (16).

MORTGAGES—

On wife's land, superior to husband's right of inheritance, see DESCENT AND DISTRIBUTION, 18; *Hampton v. Murphy*, 513, 520 (4).

Decree of foreclosure cannot be collaterally attacked, where defendants filed answer, jurisdiction of subject-matter being presumed, see JUDGMENT, 4; *Myer v. Minch*, 495, 497 (1).

1. *Execution by Wife*.—A mortgage executed by a wife, to be valid, must be signed by her husband. *Hampton v. Murphy*, 513, 519 (2).

2. *Infant Grantors*.—A mortgage executed by an infant married woman's grantee, ignorant of her age and believing her to be twenty-one years old, and which grantee received two subsequent ratifying deeds upon an express representation that the grantor was twenty-one years old, is valid and binding, there having been no return of the consideration to such grantee.

Ackerman v. Hawkins, 483, 494 (3).

3. *Foreclosure*.—*Parties*.—*Assignees*.—A mortgagee is entitled to a decree of foreclosure against not only the mortgagor, but also his assignees. *Vancleef v. Britton*, 388, 389 (2).

MOTIONS—

To strike out partly incompetent evidence, see EVIDENCE, 5; *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401, 407 (7).

For a *venire de novo* should be overruled, where special findings cover contested items in final report, see EXECUTORS AND ADMINISTRATORS, 9; *Roberts v. Dimmett*, 566, 568 (1).

For a *venire de novo*, improper, in trial of exceptions to guardian's final report, see GUARDIAN AND WARD, 1; *Hudspeth v. Kitchen*, 524, 526 (1).

MOTIONS—Continued.

To modify judgment, see JUDGMENT.

For a new trial, see NEW TRIAL.

To strike out paragraphs of cross-complaint, see PLEADING, 19; *Ellison v. Branstrator*, 307, 311 (3).

To strike out pleadings do not raise question of sufficiency, see PLEADING, 20; *Ellison v. Branstrator*, 307, 311 (4).

To strike out pleadings incapable of amendment so as to be germane, should be sustained, see PLEADING, 21; *Ellison v. Branstrator*, 307, 312 (5).

To separate causes, not reversible, see PLEADING, 22; *Pittsburgh, etc., R. Co. v. Wood*, 1, 9 (6).

MULTIPLICITY—

Of actions, as ground for equitable relief, see INJUNCTION, 1; *Wirrick v. Boyles*, 698, 700 (3).

Of actions, prevention of, as ground for injunction, see TRESPASS, 1; *Wirrick v. Boyles*, 698, 700 (4).

MUNICIPAL CORPORATIONS.

I. PROCEEDINGS OF COUNCIL.
(a) MEETINGS, RULES AND PROCEEDINGS, 1.

(b) ORDINANCES AND BY-LAWS, 2-6.

II. OFFICERS, AGENTS AND EMPLOYEES.
(a) MUNICIPAL DEPARTMENTS AND OFFICERS THEREOF, 7.

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(a) STREETS AND OTHER PUBLIC WAYS, 8-22.

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(a) RIGHTS OF TAXPAYERS, 24, 25.

No appeal from street assessment, unless specially authorized, see APPEAL, 3, 4; *City of Crawfordville v. Brown*, 592.

City ordinances, how proved, see EVIDENCE, 19; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 246 (18).

Railroad company's violation of city ordinance, injury because of, see MASTER AND SERVANT, 31, 33, 34; *Pittsburgh, etc., R. Co. v. Rogers*, 230.

Complaint against railroad company for killing servant in violating city ordinance, see MASTER AND SERVANT, 39; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 242 (13).

Liable to persons injured by the proper use of a defective bridge, see NEGLIGENCE, 1; *City of Fort Wayne v. Merriman*, 286, 288 (1).

Complaint to abate open sewer, see NUISANCE, 7-9; *City of Cannelton v. Bush*, 638.

Use of streets by railroads, see RAILROADS.

Railroad company, not liable for change of grade made by city, see RAILROADS, 14; *Chicago, etc., R. Co. v. Johnson*, 162, 168 (4).

Use of streets for maintenance of poles implies the right of others to use poles for proper purpose, see TELEGRAPHS AND TELEPHONES, 5; *Beaning v. South Bend Electric Co.*, 261, 271 (6).

I. PROCEEDINGS OF COUNCIL.

(A) MEETINGS, RULES AND PROCEEDINGS.

1. *Towns.—Statutory Methods of Action.*—Boards of trustees of towns can perform their acts only in the statutory way.

Campbell v. Brackett, 293, 296 (3).

MUNICIPAL CORPORATIONS—Continued.**(B) ORDINANCES AND BY-LAWS.**

2. *Acts.—Validity.*—Acts of a town performed in direct violation of a statute are void. *Campbell v. Brackett*, 293, 296 (4).
3. *Official Acts.—Presumptions.*—The acts of the common council of a city are presumed to be lawful. *City of Logansport v. Webster*, 499, 502 (4).
4. *Ordinances.—Repeal by Implication.*—The repeal by implication of one city ordinance by another is effected only where the repugnancy between such ordinances is so clear that they cannot be reconciled. *City of Indianapolis v. Martin*, 256, 257 (1).
5. *Ordinances.—Repeal.—City Hospitals.—Superintendents.—Salaries.*—An ordinance creating the office of superintendent of the city hospital for contagious diseases, and fixing the salary of such superintendent, is not repealed by an ordinance whose title relates to certain offices and whose subject-matter is not the same as that of the former. *City of Indianapolis v. Martin*, 256, 257 (2).
6. *Streets.—Grading.—Occupancy by Railroads.*—Cities having the right to establish grades for the streets thereof, and the occupancy of a street by a railroad company does not lessen nor affect such power. *Chicago, etc., R. Co. v. Johnson*, 162, 167 (1).

II. OFFICERS, AGENTS AND EMPLOYEES.**(A) MUNICIPAL DEPARTMENTS AND OFFICES THEREOF.**

7. *Superintendent of Contagious Hospital.—Salary.—Failure to Appropriate for.—Contracts.*—The city's failure to appropriate money for the payment of the salary of the superintendent of its hospital for contagious diseases does not prevent his recovery thereof on the ground that an ordinance provides that "no executive department, officer or employe thereof shall have the power to bind such city to any contract, agreement, or in any other way" beyond the money appropriated for such purpose, since such salary does not rest on a contract. *City of Indianapolis v. Martin*, 256, 257 (3).

III. USE AND REGULATION OF PUBLIC PLACES.**(A) STREETS AND OTHER PUBLIC WAYS.**

8. *Grading Streets.—Damages.*—Except by statute, cities are not liable for damages caused by the proper grading of streets. *Chicago, etc., R. Co. v. Johnson*, 162, 167 (2).
9. *Grading Streets.—Delegation of Power.—Railroads.*—Cities cannot delegate their power to establish street grades to railroad companies. *Chicago, etc., R. Co. v. Johnson*, 162, 167 (3).
10. *Streets.—Easements.—Railroads.*—Cities may grant to railroad companies the right to use the streets, but such grants do not prevent frontagers from recovering damages for the additional burdens imposed upon their lots. *Chicago, etc., R. Co. v. Johnson*, 162, 170 (7).
11. *Streets.—Highways.—Ownership of.*—The owner of a lot abutting on a highway owns to the middle of such highway. *Chicago, etc., R. Co. v. Johnson*, 162, 170 (8).
12. *Defective Sidewalks.—Notice.—Complaint.*—An allegation that defendant city had maintained a defective sidewalk for two years

MUNICIPAL CORPORATIONS—Continued.

preceding the plaintiff's injury, shows that the city had at least constructive notice of the defect.

City of Tipton v. Freeman, 76, 78 (2).

13. *Sidewalks.—Duty.*—Cities are required to keep their sidewalks in such a condition that persons using them with prudence and ordinary care, may do so without peril.

City of Tipton v. Freeman, 76, 79 (3).

14. *Defective Sidewalks.—Complaint.*—A complaint alleging that defendant city negligently permitted and suffered its sidewalks to remain for two years in a slanting, polished condition, by reason of which plaintiff fell, to her damage, states a cause of action.

City of Tipton v. Freeman, 76, 79 (4).

15. *Liability for Negligence.*—A municipal corporation is not an insurer of the safety of its streets; and to hold it liable negligence must be shown.

City of Greenfield v. Roback, 70, 72 (2), 74 (2).

16. *Negligence.—Complaint.*—A complaint alleging that defendant city for six months permitted to remain a sidewalk upon which there projected a piece of timber used as a horse for steps constructed by an adjacent lot owner, that the plaintiff without any knowledge thereof was traveling upon such sidewalk, at night, and struck such timber, throwing him heavily upon the walk, to his damage, fails to state a cause of action, since it fails to state that any act was negligently done, and such facts might exist without negligence.

City of Greenfield v. Roback, 70, 74 (3).

17. *Alley Improvements.—Appeal.—Time for Taking.*—An appeal from the final order of a city council in fixing alley improvement assessments must be taken within twenty days (§3623e Burns 1901, Acts 1901, p. 534, §5).

City of Logansport v. Webster, 499, 501 (1).

18. *Alley Improvements.—Appeal from Order for.—Complaint.—Construction.*—On an appeal from the action of a city council ordering the improvement of an alley, the transcript, on appeal, is treated as a complaint; but such complaint must be liberally construed.

City of Logansport v. Webster, 499, 501 (2).

19. *Records.—Receipt of Bids for Alley Improvements.—Evidence.—Postponements.*—The law does not require that a record be made of the meeting of a city council, on the opening of bids for an alley improvement, or of its action in opening bids, such actions being provable by parol evidence.

City of Logansport v. Webster, 499, 502 (3).

20. *Alley Improvements.—Bids.—Opening of.—Presumptions.*—Where the report of a street committee made on July 6 shows that bids had been received and opened, the presumption is that such bids were received and opened at the proper time, especially where no complaint had been made as to such improvement.

City of Logansport v. Webster, 499, 502 (5).

21. *Alley Improvements.—Estoppel.*—Frontagers who stand by and permit alley improvements to be made, making no objections thereto until the work is completed, are estopped to take advantage of mere irregularities in order to avoid payment therefor.

City of Logansport v. Webster, 499, 504 (6).

22. *Defective Alley Improvement Proceedings.—Burden of Proof.*—One objecting to the proceedings of a city council in receiving and opening bids for an alley improvement must show, in an appeal

MUNICIPAL CORPORATIONS—Continued.

from the action of such council, that his substantial rights have been violated. *City of Logansport v. Webster*, 499, 504 (7).

(B) SEWERS AND DRAINS.

23. *Drains.—Discontinuance.—Surface-Waters.*—A drain constructed by a city for carrying off surface-waters may be discontinued by such city without liability, where property owners are left in no worse condition than they occupied prior to the construction of such drain.

Finley v. City of Kendallville, 430, 432 (1).

IV. FINANCES.**(A) RIGHTS OF TAXPAYERS.**

24. *Void Payments.—Recovery.—Injunction.*—Void payments made by a town do not become the property of the persons receiving them, and may be recovered by the taxpayers by injunction, or any other appropriate proceeding.

Campbell v. Brackett, 293, 296 (5).

25. *Violation of Statute.—Good Faith.*—That a town board acted in good faith in making a payment in violation of the law constitutes no defense for such act.

Campbell v. Brackett, 293, 297 (6).

MUTUAL BENEFIT SOCIETIES—

See INSURANCE.

NEGLIGENCE—

See CARRIERS; DAMAGES; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; TELEGRAPHS AND TELEPHONES.

Of attorney constitutes counterclaim in action for fees, see ATTORNEY AND CLIENT, 4; *Rooker v. Bruce*, 57, 58 (2).

Contributory negligence of passenger, instructions concerning, see CARRIERS, 41, 43, 44.

Directed verdict for two joint defendants in action for, reversible, where there is evidence tending to support judgment against either, see TRIAL, 4; *Beaning v. South Bend Electric Co.*, 261, 268 (4).

1. *Defective Bridges.—Municipal Corporations.—Pedestrians.*—A city owes no duty to a person injured by reason of a defective bridge, unless such person was using such bridge for a proper purpose. *City of Fort Wayne v. Merriman*, 286, 288 (1).

2. *Trespassers.—Licensees.*—The owner of property is not liable to trespassers or bare licensees for mere negligence.

Beaning v. South Bend Electric Co., 261, 271 (5).

3. *Electric Light Companies.—Uninsulated Wires.*—An electric light company maintaining a defectively insulated wire so close to a telephone pole that it injured an employe rightfully climbing such pole, is liable therefor.

Beaning v. South Bend Electric Co., 261, 277 (10).

4. *County Fairs.—Shooting Galleries.—Free Admission of Boy Contrary to Rule Requiring Pay.*—Evidence showing that a boy twelve years old was admitted into a county fair free by the society's gateman, that the rule required boys over ten years old to pay a fee for admission, there being no evidence that the boy

NEGLIGENCE—Continued.

- knew of such rule, that while standing near a shooting gallery authorized by defendant society he was killed by a gun negligently handled by a boy who was engaged in shooting, with defendant's authority, supports an action for damages by the father of such boy. *Plaskett v. Benton-Warren, etc., Soc.*, 358, 361 (4).
5. *Proximate Cause.—Anticipation of Injury.*—To constitute actionable negligence it is not necessary that defendant should have anticipated the precise injury occasioned by the negligent act. *Cook v. Ormsby*, 352, 356 (5).
6. *Proximate Cause.—Circumstantial Evidence.*—A city is not liable for injuries sustained because of a defective bridge unless such negligence was the proximate cause of the injury, but such negligence and proximate cause of the injury sustained may be established by circumstantial evidence. *City of Fort Wayne v. Merriman*, 286, 288 (2).
7. *Driving Unruly Team on Highway Where Interurban Cars Pass.*—The driving of an unruly team along a highway, knowing that interurban cars pass thereover, does not constitute negligence. *Cincinnati, etc., Electric St. R. Co. v. Cook*, 401, 408 (9).
8. *Facts Constituting.—Complaint.*—A complaint which fails to allege that the acts complained of were negligently done, must allege facts showing a necessary inference of negligence. *City of Greenfield v. Roback*, 70, 72 (1).
9. *Complaint.—Railroads.—Injuries to Property.—Negating Contributory Negligence.—Presumptions.*—In actions for damages to property, the plaintiff must aver and prove freedom from contributory negligence, and the presumption is against the one having the burden of proof. *Cleveland, etc., R. Co. v. Moore*, 58, 60 (4).
10. *Telegraphs and Telephones.—Complaint.—Barring Another Action.*—A complaint alleging that defendant telephone company negligently attached a cable to a cable seat, thereby grounding the cable seat and causing injury to a city employee who was ascending the telephone pole in order to make repairs, and that defendant electric light company negligently maintained an uninsulated high voltage wire so near such pole as to come in contact with one climbing such pole, thereby injuring such employee, is sufficient to bar another action for such injury. *Beaning v. South Bend Electric Co.*, 261, 266 (2).
11. *Joint.—Complaint.—Proof.—Telephone and Electric Light Companies.*—A complaint alleging that defendants telephone and electric light companies by their alleged particular acts of negligence caused injuries to the plaintiff, will support a verdict against one or both of such companies. *Beaning v. South Bend Electric Co.*, 261, 278 (11).
12. *Cities.—Bridges.—Evidence.*—Mere evidence that a bridge belonging to a city was protected by a defective guardrail, that the plaintiff's decedent was found dead under the bridge, and that the rail showed that she had fallen over at such point, is not sufficient to establish a liability against such city. *City of Fort Wayne v. Merriman*, 286, 289 (3).
13. *Telephone and Electric Light Companies.—Directing Verdict.—Evidence.*—Evidence tending to show that defendant electric light company maintained an uninsulated wire so near to a cable seat on a telephone pole that a city employee in climbing such pole

NEGLIGENCE—Continued.

was injured thereby, and that defendant telephone company maintained a cable attached to a cable seat by means of a wire, thereby causing such employe, when he came near such uninsulated wire, to receive a shock therefrom, is sufficient to entitle the plaintiff to a submission of his case to the jury as against each defendant.

Beaning v. South Bend Electric Co., 261, 279 (12).

14. *Contributory.—Question for Jury.—Telephone and Electric Light Companies.*—Whether a city employe who in disentangling the police telephone wires from those of a telephone company climbed the company's pole and in so doing received a shock from an electric light wire maintained uninsulated near the telephone pole which supported a cable attached to a cable seat by means of a wire, was guilty of contributory negligence, is a question for the jury.

Beaning v. South Bend Electric Co., 261, 280 (13).

NEGOTIABLE INSTRUMENTS—

See **BILLS AND NOTES.**

NEW TRIAL—

Erroneous admission of evidence, to be questioned on appeal, must be made cause for, see **APPEAL**, 8; *New Long Distance Tel. Co. v. White*, 382, 386 (2).

Insufficiency of evidence to sustain special findings, cannot be considered, where evidence is not in record, see **APPEAL**, 9; *Roberts v. Dimmctt*, 566, 569 (2).

Insufficiency of evidence, as a ground for, cannot be considered, where bill of exceptions shows omission of some of the evidence, see **APPEAL**, 10; *McGary v. Yeager*, 696.

May be ordered, on appeal, though appellant is technically entitled to judgment, see **APPEAL**, 68; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 365 (6).

Motion for, not proper on a demurrer to the evidence, see **TRIAL**, 9; *Plaskett v. Benton-Warren, etc., Soc.*, 358, 365 (5).

Motion for, cannot present question of correctness of conclusions of law, see **TRIAL**, 37; *Boos v. Siegmund*, 284, 285 (2).

1. *General Reasons for.—Contributory Negligence.—Burden of Proof.—Instructions.*—That the instructions as to contributory negligence and the burden of proof in establishing it are confusing, contradictory and misleading, is too general for an assignment as a ground for a new trial, and presents no question, and should, in any event be disregarded, where the record shows that the instructions fully and fairly placed the case before the jury.

Terre Haute Traction, etc., Co. v. Payne, 132, 144 (15).

2. *Designating Instructions Questioned.*—A motion for a new trial assigning as one reason the giving of certain numbered instructions, and, as another, the giving of certain instructions requested by plaintiff, sufficiently designates the questioned instructions, where two sets of instructions were presented, one by plaintiff, the other by defendants. *State, ex rel., v. Dudley*, 674, 675 (2).

3. *Excessive Recovery.—Motion to Modify Judgment.—Contracts.*—Where the amount of recovery, on a breach of contract, was too large, the question is properly raised by making such amount a ground for a new trial; and it is not necessary to move to modify the judgment.

Baker v. Anderson Tool Co., 619, 621 (2).

NOTES—

See **BILLS AND NOTES.**

NOTICE—

See **LANDLORD AND TENANT; MASTER AND SERVANT.**

Attorney should notify client when collection is made, see **ATTORNEY AND CLIENT, 2; Spencer v. Smith, 17, 19 (2).**

Of defenses, see **BILLS AND NOTES.**

Required, before landlord can be held liable for saloon nuisance on his premises, see **NUISANCE, 3; Joseph Schlitz Brewing Co. v. Shiel, 623, 625 (4).**

To railroad company to repair or construct fence, see **RAILROADS, 6-9.**

Of trust, as affecting title of purchaser, see **VENDOR AND PURCHASER, 9-11; Weeks v. Hathaway, 196.**

NUISANCE—

May be enjoined, see **DAMAGES, 2; Foor v. Edwards, 259, 261 (4).**

Authorized use of highway by interurban railroad, not necessarily a nuisance, see **RAILROADS, 34; Fowler v. Fort Wayne, etc., Traction Co., 441, 443 (3).**

1. *Definition.*—"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," is a nuisance (§291 Burns 1908, §289 R. S. 1881).
City of Cannelton v. Bush, 638, 641 (2).
Foor v. Edwards, 259, 260 (1).

2. *Action.—Parties.*—Any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, may maintain an action therefor.
City of Cannelton v. Bush, 638, 641 (3).

3. *Damages.—Saloon.—Landlord.—Notice.*—A landlord who rents property for saloon purposes is not liable for damages caused by the unlawful operation of a saloon thereon, unless he had notice of the misconduct; and such notice must be alleged and proved.
Joseph Schlitz Brewing Co. v. Shiel, 623, 625 (4).

4. *Saloon.—Location.—Business District.*—A saloon located in the business district does not constitute a nuisance *per se*.
Joseph Schlitz Brewing Co. v. Shiel, 623, 625 (3).

5. *Skating-Rinks.*—A skating-rink is not a nuisance *per se*, but whenever it is so conducted as to interfere with the use and enjoyment of another's property, it becomes a nuisance.
Foor v. Edwards, 259, 261 (2).

6. *Skating-Rink.—Abatement.—Complaint.*—A complaint alleging that defendants maintain a skating-rink over plaintiffs' store and that the operation of such rink is driving away the plaintiffs' customers and will destroy their business, is sufficient; and it is not necessary to set out the names of such customers.
Foor v. Edwards, 259, 261 (3).

7. *Open Sewers.—Cities.—Complaint.*—A paragraph of complaint alleging that defendant city maintained an open ditch into which it discharged sewage, that such ditch was in the rear of plaintiff's lot and that offensive odors arose therefrom, to plaintiff's

NUISANCE—Continued.

damage, is sufficient, though it fails to allege that it was defendant's duty to keep such ditch clean.

City of Cannelton v. Bush, 638, 640 (1).

8. *Sewers.—Complaint.*—A paragraph of complaint alleging that defendant city discharged sewage into an open ditch at the rear of plaintiff's lots, rendering them less desirable for building purposes, and worthless for garden purposes, to plaintiff's damage in the sum of \$500, is sufficient.

City of Cannelton v. Bush, 638, 641 (4).

9. *Sewers.—Injury to Lots.—Complaint.*—A paragraph of complaint alleging that defendant city discharged sewage into an open ditch at the rear of plaintiff's lots, rendering them less desirable for building and garden purposes, and that plaintiff purchased one of such lots on the day of the filing of the action, is sufficient, since the other lots were alleged to be damaged.

City of Cannelton v. Bush, 638, 641 (5).

10. *Maintenance of Saloons.—Complaint.*—A complaint attacked for the first time on appeal, alleging that defendants maintained a disorderly drinking saloon, offensive to the public, and privately injurious to the plaintiff, is sufficient, since it states facts sufficient to bar another suit for the same cause.

Joseph Schlitz Brewing Co. v. Shiel, 623, 624 (1).

11. *Damages.—Saloon.—Evidence.*—Evidence that the treasurer of a Milwaukee brewing company, residing at Milwaukee, owned a building in the business district of Indianapolis and rented it through a local agent to a saloon-keeper for saloon purposes, that his brewing company furnished its beer to such saloon-keeper who sold only that brand, that the owner discharged his rental agent and substituted as his agent the brewing company's agent, and that the saloon was afterwards carried on by the brewing company does not support a judgment for damages, nor a decree of injunction.

Joseph Schlitz Brewing Co. v. Shiel, 623, 624 (2), 626 (2).

NUNC PRO TUNC ENTRIES—

Showing judge's signature to special findings, see **APPEAL**, 22; *Cole Carriage Co. v. Hornbeck*, 61, 63 (2).

Cannot be used to remedy judge's failure to sign instructions. see **TRIAL**, 19; *Bottorff v. Bottorff*, 692, 693 (3).

OFFICERS—

Of corporations, removal of, see **CORPORATIONS**, 6; *Griffith v. Sproul*, 504, 510 (5).

Road supervisors, see **HIGHWAYS**.

OIL AND GAS—

See **CONTRACTS**; **COVENANTS**; **MECHANICS' LIENS**.

OPINIONS—

See **EVIDENCE**.

Of value, sometimes binding, see **VENDOR AND PURCHASER**, 2; *Bolt v. O'Conner*, 178, 181 (2).

Of nonexperts, after stating facts, admissible, see **WITNESSES**, 1; *Wiseman v. Gouldsberry*, 677, 679 (3).

ORDINANCES—

See MUNICIPAL CORPORATIONS.

OWNERSHIP—

See ALIENS.

OVERRULED CASES—

See CASES.

PARENT AND CHILD—

See BASTARDY; DEEDS; DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Contracts for support, breach of, see CONTRACTS, 29; *Saylor v. Obendorf*, 436, 439 (2).

Adopted child inherits adopting parent's interest in contingent remainder, see DESCENT AND DISTRIBUTION, 4; *Adams v. Merrill*, 315, 325 (9).

Adopted children inherit the same as others, see DESCENT AND DISTRIBUTION, 5; *Adams v. Merrill*, 315, 326 (12).

1. *Services.—Contracts.*—Parents are liable to their children where services were performed under an express contract to pay therefor, or, where the circumstances show the parents' purpose to pay, and the children's expectation to receive pay therefor.

Hill v. Hill, 99, 100 (1).

2. *Services.—Contracts.—Evidence.*—Evidence showing that a daughter told her father that she was not satisfied, whereupon he told her he could do better for her at home than she could do "out in the world," and that she would be well paid for all she did there, supports a judgment rendered for services under an express contract.

Hill v. Hill, 99, 100 (2).

3. *Grandparents.—Grandchildren.—Services.*—In the absence of a contract a grandparent is not entitled to compensation for caring for his grandchild who is a member of his family.

Lewis v. Hershey, 104, 110 (8).

PARTIES—

See JUDGMENT.

On appeal, see APPEAL, 11.

Judgment may be reversed as to all, where justice requires, see APPEAL, 67; *Todd v. Mills*, 471, 474 (2).

To foreclosure suit, see MORTGAGES, 3; *Vancelef v. Britton*, 388, 389 (2).

To action for nuisance, see NUISANCE.

To action in replevin to recover road tools, see REPLEVIN; *Cathcart v. New Durham Tp.*, 102, 103 (1).

PARTITION—

As to title given by decree in suit for, see JUDGMENT, 9; *Dodd v. Shanton*, 377, 382 (6).

1. *Report of Commissioners.—Exceptions.*—Exceptions to the report of commissioners in partition must show that the exceptors were injured by the action of such commissioners, or that the tracts set off to them were not of equal value with the others.

Selva v. Green, 642, 644 (1).

2. *Report of Commissioners.—Verified Exceptions.—Evidence.—Conduct of Commissioners.*—Verified exceptions to the report of commissioners in partition stating that the commissioners con-

PARTITION—Continued.

sulted with the other parties, but not with the exceptors, and that they failed to value each tract separately, are not sufficient evidence to invalidate the partition made, since there is no showing that the shares of the exceptors were less valuable than those given to the other parties. *Selva v. Green*, 642, 644 (2).

PARTNERSHIP—

Husband and wife may become partners, see **HUSBAND AND WIFE**, 5; *Wasem v. Raben*, 221, 225 (2).

PASSENGERS—

See **CARRIERS**.

PATENTS—

Sale of rights, see **CONTRACTS**, 9; *Batley v. Miller*, 475, 476 (2), 477 (2).

PAYMENT—

Of judgment for costs bars another action therefor, see **COSTS**, 3; *Dodge v. Lake Shore, etc., R. Co.*, 281, 283 (5).

PENALTIES—

See **CONTRACTS**.

Appellate Court may impose, see **APPEAL**, 63.

For failure to deliver messages, see **TELEGRAPHS AND TELEPHONES**.

PHYSICIANS AND SURGEONS—

Unlicensed, notes given to, in payment for medical services, see **BILLS AND NOTES**, 5; *Hill v. Ward*, 458, 464 (5).

Contract of employment of, by railroad companies, see **CONTRACTS**, 14; *Southern R. Co. v. Hazelwood*, 478, 481 (4).

May be employed by railroad companies, see **RAILROADS**, 16-19; *Southern R. Co. v. Hazelwood*, 478.

PLEADING.

- I. FORM AND ALLEGATIONS, 1, 2.
- II. COMPLAINT OR PETITION, 3-12.
- III. PLEA OR ANSWER, 13.
- IV. DEMURRER OR EXCEPTION, 14.
- V. AMENDED PLEADING, 15, 16.

- VI. FILING, SERVICE AND WITHDRAWAL, 17, 18.
- VII. MOTIONS, 19-22.
- VIII. DEFECTS CURED BY VERDICT, 23.

I. FORM AND ALLEGATIONS.

1. *Presumptions*.—The presumption is that a pleading contains all of the facts favorable to the pleader.

Stahl v. Illinois Oil Co., 211, 214 (4).

2. *Relevancy*.—A pleading that has no substantial relation to the controversy is irrelevant, but if it may be amended so as to make it germane it can be demurred to, but cannot be stricken out on motion.

Ellison v. Branstrator, 307, 312 (6).

PLEADING—Continued.

II. COMPLAINT OR PETITION.

See **ABATEMENT**; **ACTION**; **CARRIERS**; **SET-OFF AND COUNTERCLAIM**.

Rulings upon complaint, not reviewable, in absence of record showing the filing thereof, see **APPEAL**, 7; *Castle v. Clark*, 192, 193 (1).

Complaints for failure to transport goods, see **CARRIERS**.

Complaints for breach of contract, see **CONTRACTS**.

Complaint for contribution, see **CONTRIBUTION**.

Complaint in condemnation proceedings, see **EMINENT DOMAIN**.

Claims against estates, see **EXECUTORS AND ADMINISTRATORS**.

Complaints for injunction, see **INJUNCTION**.

Complaint by taxpayers to recover money unlawfully allowed by town board, see **INJUNCTION**, 4; *Campbell v. Brackett*, 293, 294 (2).

Complaint to restrain use of trade-name, see **INJUNCTION**, 5; *Computing Cheese Cutter Co. v. Dunn*, 20, 27 (8).

Complaint on policy, see **INSURANCE**.

Complaint on judgment, see **JUDGMENT**.

Complaint for possession, see **LANDLORD AND TENANT**.

Complaint in actions by servants, see **MASTER AND SERVANT**.

Amended complaint, how affected by statute of limitations, see **MASTER AND SERVANT**, 35; *Raley v. Evansville Gas., etc., Co.*, 649, 655 (4), 657 (4).

Complaints against city because of injuries caused by defective sidewalks, see **MUNICIPAL CORPORATIONS**, 14, 16.

Transcript on appeal from alley assessment is complaint, see **MUNICIPAL CORPORATIONS**, 18; *City of Logansport v. Webster*, 490, 501 (2).

Complaints for negligence, see **NEGLIGENCE**.

Complaint for maintenance of nuisance, see **NUISANCE**.

Complaint to quiet title, see **QUIETING TITLE**.

Complaints against railroad companies, see **RAILROADS**.

Complaint by physician need not show a license, see **RAILROADS**, 16; *Southern R. Co. v. Hazelwood*, 478, 480 (1), 481 (1).

Complaint before justice of the peace against railroad company, see **RAILROADS**, 21; *Cleveland, etc., R. Co. v. Moore*, 58, 59 (1).

As to alleged recital in complaint, see **RAILROADS**, 32.

Complaint to enforce contract of sale of land, see **SPECIFIC PERFORMANCE**.

Complaint for penalty for failure to deliver message, see **TELEGRAPHS AND TELEPHONES**, 1; *Western Union Tel. Co. v. Kitzke*, 550, 552 (1).

Complaint against telephone company, by servant of city, while disentangling police telephone wires, see **TELEGRAPHS AND TELEPHONES**, 7; *Beaning v. South Bend Electric Co.*, 261, 276 (8).

Complaint to construe will, see **WILLS**, 19; *Coulter v. Crawfordsville Trust Co.*, 64, 68 (5).

Complaint for commissions and for money advanced, see **WORK AND LABOR**; *Wulschner-Stewart Music Co. v. Helft*, 428 (1).

PLEADING—Continued.

3. *Complaint.—Sufficiency of.*—A complaint must state facts in such language that a person of common understanding may know what is intended. *Knickerbocker Ice Co. v. Smith*, 445, 449 (2).
4. *Complaint.—Test of.*—The test of the sufficiency of a complaint is whether a person of ordinary understanding can know what was intended thereby, and not whether an extraordinarily acute mind can distort the meaning into something different. *Indianapolis, etc., Traction Co. v. Newby*, 540, 543 (2).
5. *Complaint.—Consideration of.—Evidence.*—In determining the sufficiency of a complaint, the evidence cannot be considered. *Hill v. Ward*, 458, 465 (6).
6. *Complaint.—Verbal Niceties.*—Courts will not indulge in mere verbal quibbles in determining the substantial rights of parties. *Chicago, etc., R. Co. v. Johnson*, 162, 172 (11).
7. *Complaint.—Theory.*—A complaint should proceed upon a definite theory. *Fowler v. Fort Wayne, etc., Traction Co.*, 441, 443, (1).
8. *Complaint.—Theory.—Changing of, on Appeal.*—The theory of a complaint adhered to in the trial court cannot be changed on appeal. *Indiana, etc., Oil Co. v. Stewart*, 554, 556 (1).
9. *Complaint.—Sufficiency at Common Law or by Statute.*—A complaint stating facts sufficient to show a cause of action at the common law or by statute is good on demurrer. *Pittsburgh, etc., R. Co. v. Rogers*, 230, 236 (1).
10. *Complaint.—Theory.*—A complaint stating facts sufficient to constitute a cause of action is good, although the pleader misconceived the law giving him his rights. *Pittsburgh, etc., R. Co. v. Rogers*, 230, 236 (2).
11. *Complaint.—Confusion.—Facts.—Inferences.*—Mere confusion in the statement of facts does not render a complaint bad on demurrer, and such alleged facts carry with them all necessary inferences. *Pittsburgh, etc., R. Co. v. Rogers*, 230, 239 (5).
12. *Common Counts.—Code.*—The common counts, as established by the common law, are sufficient under the Indiana code, but a common count which fails to allege that the work sued for was done, or that the money sued for was advanced by the plaintiff, is bad. *Wulschner-Stewart Music Co. v. Helft*, 428, 429 (2).

III. PLEA OR ANSWER.

- Answers in action on note, see **BILLS AND NOTES**, 1, 2; *Hill v. Ward*, 458.
- Cross-complaint in suit for contribution, see **CONTRIBUTION**, 3; *Ellison v. Branstrator*, 307, 313 (7).
- Answer in action on a fire policy, see **INSURANCE**, 6, 7; *Farmers, etc., Ins. Co. v. Hill*, 905.
- Cross-complaint for foreclosure of lien, see **MECHANICS' LIENS**, 3; *Small v. Indianapolis Mortar, etc., Co.*, 160, 161 (1).
- Answers in fence cases, see **RAILROADS**, 8; *Vandalia R. Co. v. Miller*, 366, 367 (1), 368 (1).
- Answer and counterclaim failing to show that representation of value was more than an opinion, see **VENDOR AND PURCHASER**, 3; *Boltz v. O'Conner*, 178, 181 (3).
- Where a different cause from the one pleaded is proved, a verdict should be directed, see **TRIAL**, 6; *Saylor v. Obendorf*, 436, 440 (3).

PLEADING—Continued.

13. *Answer.—Partial.*—A paragraph of answer, sufficient as to a part of the complaint, is bad, where it is addressed to the entire complaint. *Raley v. Evansville Gas, etc., Co.*, 649, 658 (10).

IV. DEMURRER OR EXCEPTION.

14. *Complaint.—Demurring to Complaint After Answer.—Waiver.*—The filing of a demurrer to a complaint after the filing of an answer raises no question, where the answer is not first withdrawn by leave of court. *Baker v. Anderson Tool Co.*, 619, 620 (1).

V. AMENDED PLEADING.

15. *Complaint.—Amendment.—Limitation of Actions.*—An amended complaint ordinarily relates to the time of the filing of the original complaint, but this rule does not apply, where it states a new cause of action. *Raley v. Evansville Gas, etc., Co.*, 649, 654 (1).
16. *Amended Complaint.—New Cause of Action.—Tests.*—An amended complaint ordinarily contains a new cause of action, (1) where the new allegations deprive defendant of any defense which he had to the original cause, (2) where the evidence establishing the original, will not establish the new, (3) where the new allegations, if in reply, would have constituted a departure, (4) where the new allegations set up a title not before asserted, and (5) where a judgment on the original complaint would not constitute a bar to the amended complaint. *Raley v. Evansville Gas, etc., Co.*, 649, 654 (3).

VI. FILING, SERVICE AND WITHDRAWAL.

17. *Intervening Petition.—Denial of Permission to File.—Discretion.—Presumption.*—Refusing to permit stockholders the right to file an intervening petition in a suit for the appointment of a receiver for the corporation, charges of fraud being made, three and one-half months after a receiver had been appointed by virtue of an alleged fraudulent agreement, is an abuse of discretion, the presumption in favor of the ruling of the trial court being overthrown by the uncontradicted and verified allegations of fraud. *Thayer v. Kinder*, 111, 114 (7), 115 (7).
18. *Permission to File Answer After Beginning of.—Trial.—Telephones.—Erection.—Damages.*—In a suit to restrain property owners from interfering with a stub telephone pole, it is not harmful to the plaintiff for the trial judge, after the trial has begun, to permit defendants to file an additional paragraph of answer, alleging that the company had no right to erect such pole, that it was an obstruction to their property, and that they were damaged thereby, the judgment giving no damages on such account. *New Long Distance Tel. Co. v. White*, 382, 386 (1).

VII. MOTIONS.

19. *Cross-Complaints.—Paragraphs.—Striking Out on Joint Motion.*—Sustaining a motion to strike out a cross-complaint consisting of several paragraphs constitutes reversible error if one of such paragraphs is sufficient to withstand such motion. *Ellison v. Branstrator*, 307, 311 (3).

PLEADING—Continued.

20. *Motions to Strike Out.—Questions Presentable.*—A motion to strike out a pleading does not raise the question of its sufficiency. *Ellison v. Branstrator*, 307, 311 (4).
21. *Motions to Strike Out.—Relevancy.*—A pleading incapable of amendment so as to make it germane to the issues, may be rejected on motion. *Ellison v. Branstrator*, 307, 312 (5).
22. *Overruling Motion to Separate Causes.—Appeal.*—The erroneous overruling of a motion to separate the causes of action stated in the complaint does not constitute reversible error. *Pittsburgh, etc., R. Co. v. Wood*, 1, 9 (6).

VIII. DEFECTS CURED BY VERDICT.

23. *Complaint.—Insufficiency.—Directing Verdict.—When Judgment Affirmed on Complaint.—Defects Cured by Verdict.*—Where a complaint is insufficient and the case is tried, a verdict being ordered for the defendant on the ground of the insufficiency of the evidence, the Appellate Court will not affirm the judgment on the insufficiency of the complaint, unless the facts stated are not sufficient to bar another action for the same cause, otherwise the defects of the complaint will be deemed as cured by the verdict. *Beaning v. South Bend Electric Co.*, 261, 266 (1), 267 (1).

POSSESSION—

See ADVERSE POSSESSION.

PREAMBLE—

To contract, construction of, see CONTRACTS, 13; *Boyce v. Royal Stove, etc., Co.*, 469, 470 (2).

PRESUMPTIONS—

- In favor of ruling of trial court, see APPEAL, 39, 40.
- That instructions refused were not applicable to evidence, where evidence is not in record, see APPEAL, 40; *Cleveland, etc., R. Co. v. Harvey*, 153, 157 (6).
- Stopping of car, at station, presumed to be for permitting passengers to alight, see CARRIERS, 18; *Indianapolis, etc., Transit Co. v. Walsh*, 42, 45 (2).
- Of negligence, on injuring a passenger, see CARRIERS, 24; *Lake Erie, etc., R. Co. v. Cotton*, 580, 586 (7).
- That tax deeds are legal, see DEEDS, 4; *Ellison v. Branstrator*, 307, 313 (9), 314 (9).
- That one hears what is audible and sees what is visible, see EVIDENCE, 1; *Cleveland, etc., R. Co. v. Moore*, 58, 61 (6).
- Of obedience to law, see EVIDENCE, 2; *Joseph Schlitz Brewing Co. v. Shiel*, 623, 626 (5).
- None, of fraud, see FRAUD, 1; *Griffith v. Sproul*, 504, 510 (4).
- Of jurisdiction of subject-matter, see JUDGMENT, 4; *Myer v. Minch*, 495, 497 (1).
- That all court proceedings are proper, see JUDGMENT, 5; *Myer v. Minch*, 495, 497 (2).
- That railroad company will not violate city ordinance, see MASTER AND SERVANT, 47; *Pittsburgh, etc., R. Co. v. Rogers*, 230, 248 (24).

PRESUMPTIONS—Continued.

That jury understood "dust" in ordinary sense, see **MASTER AND SERVANT**, 57; *Indianapolis Foundry Co. v. Bradley*, 530, 534 (5).

That acts of city council are proper, see **MUNICIPAL CORPORATIONS**, 3; *City of Logansport v. Webster*, 499, 502 (4).

That alley improvement bids were received and opened at the proper time, see **MUNICIPAL CORPORATIONS**, 20; *City of Logansport v. Webster*, 499, 502 (5).

That pleading contains all facts favorable to pleader, see **PLEADING**, 1; *Stahl v. Illinois Oil Co.*, 211, 214 (4).

In favor of proper court ruling, overthrown by proof of fraud, see **PLEADING**, 17; *Thayer v. Kinder*, 111, 114 (7), 115 (7).

Conclusive, that railroad company occupying right of way of legal width appropriated such way, see **RAILROADS**, 10; *Chicago, etc., R. Co. v. Johnson*, 162, 169 (5).

That vendor knows the truth of his representations, see **VENDOR AND PURCHASER**, 1; *Boltz v. O'Conner*, 178, 180 (1).

That words of will were used in ordinary sense, see **WILLS**, 2; *Clore v. Smith*, 340, 342 (2).

That words of postponement in a will relate to the time of enjoyment and not to the time of vesting of the estate, see **WILLS**, 16; *Clore v. Smith*, 340, 342 (1).

PRINCIPAL AND AGENT—

See **BROKERS**; **CARRIERS**; **SALES**.

Husband may be wife's agent, see **HUSBAND AND WIFE**, 5; *Wasem v. Raben*, 221, 225 (2).

Authority of agent, see **SALES**, 2; *McCaskey Register Co. v. Curfman*, 297, 303 (2), 305 (2).

PRINCIPAL AND SURETY—

Wife may not become surety, see **HUSBAND AND WIFE**, 4; *Wasem v. Raben*, 221, 224 (1).

PROMISSORY NOTES—

See **BILLS AND NOTES**.

PROXIMATE CAUSE—

See **INTOXICATING LIQUORS**; **MASTER AND SERVANT**; **NEGLIGENCE**.

QUIETING TITLE—

See **ADVERSE POSSESSION**.

Complaint.—Exhibits.—Abstracts of Title.—An abstract of title furnished by the plaintiffs under the order of the court (§369 Burns 1908, §363 R. S. 1881), in a quiet title suit, does not constitute an exhibit, and forms no part of the complaint, such suit not being founded upon such abstract. *O'Mara v. McCarthy*, 147.

RAILROADS.

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|---|---|
| <p>I. LOCATION OF ROAD, TERMINI AND STATIONS, 1-8.</p> <p>II. RIGHTS OF WAY, 4-11.</p> <p>III. CONSTRUCTION AND MAINTENANCE, 12-14.</p> | <p>IV. OPERATION,</p> <p>(a) STATUTORY AND MUNICIPAL REGULATIONS, 15-19.</p> <p>(b) INJURIES TO LICENSEES AND TRESPASSERS, 20.</p> <p>(c) ACCIDENTS AT CROSSINGS, 21-32.</p> <p>(d) ACCIDENTS NEAR TRACKS, 33-35.</p> |
|---|---|

See CARRIERS; DAMAGES; EMINENT DOMAIN; MASTER AND SERVANT; NEGLIGENCE.

Complaint against, for failure to provide cars, see CARRIERS.

Evidence of tender of charges, in action for failure to transport goods, see CARRIERS, 5; *Pittsburgh, etc., R. Co. v. Wood*, 1, 12 (15).

Instructions in actions against, for personal injuries, see CARRIERS.

Contract for employment of surgeon, see CONTRACTS, 14; *Southern R. Co. v. Hazelwood*, 478, 481 (4).

Jurisdiction of actions against, for breach of contract, ordinarily in state courts, see COURTS, 2; *Pittsburgh, etc., R. Co. v. Wood*, 1, 7 (2).

Damages to frontagers in straightening out tracks in streets, see DAMAGES, 3; *Chicago, etc., R. Co. v. Johnson*, 162, 170 (9), 171 (9).

Evidence in actions against, for personal injuries, see EVIDENCE.

Injunction against violating decree not to obstruct access to depot, see INJUNCTION, 2; *Pittsburgh, etc., R. Co. v. Town of Remington*, 561, 565 (3).

Use of street twenty years bars action by frontager for damages, see LIMITATION OF ACTIONS, 2; *Chicago, etc., R. Co. v. Johnson*, 162, 171 (10).

Violation of city ordinance by, see MASTER AND SERVANT.

As to occupancy of streets, see MUNICIPAL CORPORATIONS, 8-11; *Chicago, etc., R. Co. v. Johnson*, 162.

Receivers of, separate persons from corporations, see RECEIVERS, 3; *Harmon v. Perkins*, 83, 86 (4).

I. LOCATION OF ROAD, TERMINI AND STATIONS.

1. *Depots.*—"Free Access" to.—*Injunction.*—*Decree.*—A decree providing that a railroad company shall not erect any barriers that will prevent "free access" to its depot or to the streets, is not violated where the enclosures do not interfere with the streets which lead to such depot.

Pittsburgh, etc., R. Co. v. Town of Remington, 561, 564 (2).

2. *Easements.*—*Depots.*—*Access to.*—*Injunctions.*—*Decree.*—A decree in a suit to enjoin a town from exercising any rights over a railroad right of way, providing that "neither party shall erect any barriers between Ohio street and Indiana street to prevent free access to the depot or streets," does not prevent the company from enclosing all parts of such right of way that are not portions of streets.

Pittsburgh, etc., R. Co. v. Town of Remington, 561, 563 (1).

3. *Depots.*—"Free Access."—*Decree.*—A decree requiring a railroad company not to obstruct the "free access" to its depots, requires not only access, but also that such access shall not be in any manner obstructed.

Pittsburgh, etc., R. Co. v. Town of Remington, 561, 565 (5).

RAILROADS—Continued.

II. RIGHTS OF WAY.

4. *Fencing Rights of Way.—Statutes.*—The object of laws requiring railroad companies to fence their rights of way, is for the protection of life and property. *Vandalia R. Co. v. Walker*, 702.
5. *Fences.—Complaint.*—A complaint following the requirements of the statute for the building of fences along a railroad right of way, is sufficient. *Vandalia R. Co. v. Muhn*, 703 (1).
6. *Fences.—Notice.*—A notice given by a landowner under §5448 Burns 1908, Acts 1885, p. 224, §2, providing for the construction of a new fence, is proper, where the old fence was so out of repair that a new one was needed. *Vandalia R. Co. v. Muhn*, 703, 704 (2).
7. *Fences.—Notice.*—A notice given by a landowner, under §5448 Burns 1908, Acts 1885, p. 224, §2, providing for the construction of a new fence, is proper, where the old fence was so out of repair that a new one was needed. *Vandalia R. Co. v. Blum*, 697 (1).
8. *Rights of Way.—Erection of New Fence.—Repairs.—Complaint.—Paragraphs.—Answer.*—Where one paragraph of a complaint against a railroad company seeks to recover the cost of erecting a new fence along defendant's right of way, and another, for the cost of repairing a fence along such right of way, an answer alleging that the notices given to such company—one for erecting a new fence, the other, for repairing an old one—were for the same fence and were so confusing that defendant could not determine what the plaintiff wanted the defendant to do, is bad, the defendant being presumed to know whether a new fence should be built, or the old one repaired. *Vandalia R. Co. v. Miller*, 366, 367 (1), 368 (1).
9. *Rights of Way.—Fences.—Statutes.—Construction.*—Sections 5448, 5449 Burns 1908, Acts 1885, p. 224, §§2, 3, requiring railroad companies to construct and keep in repair fences along their rights of way, are liberally construed together, and constitute a scheme to secure the fencing of railroad rights of way. *Vandalia R. Co. v. Miller*, 366, 369 (2).
10. *Rights of Way.—Occupancy.—Presumptions.*—A railroad company that takes possession of a right of way of the full legal width will be conclusively presumed to have appropriated such land. *Chicago, etc., R. Co. v. Johnson*, 162, 169 (5).
11. *Occupancy of Streets.—Presumptions.—Easements.*—A railroad company which has occupied a certain portion of a street for more than twenty years obtains title to such portion, but its use is subservient to the use thereof as a street, and the city may require such company to straighten its track therein. *Chicago, etc., R. Co. v. Johnson*, 162, 169 (6).

III. CONSTRUCTION AND MAINTENANCE.

12. *Rights of Way.—Contracts.*—A railroad company receiving a grant of a right of way on which to build switches must abide by the conditions of such grant. *Barth v. Pittsburgh, etc., R. Co.*, 434, 436 (1).
13. *Violating Easement Rights.—Increase of Hazard.*—A railroad company that violates the provisions of a right of way contract, thereby increasing the hazard to the grantor's property, can be enjoined. *Barth v. Pittsburgh, etc., R. Co.*, 434, 436 (2).

RAILROADS—Continued.

14. *Changing Grades.—Damages.—Streets.—Cities.*—A railroad company that changes its grade to conform to a city ordinance, in the absence of negligence, is not liable to a frontager for damages to his lot. *Chicago, etc., R. Co. v. Johnson*, 162, 168 (4).

IV. - OPERATION.**(A) STATUTORY AND MUNICIPAL REGULATIONS.**

15. *Common-Law Duty.*—At the common law it is a railroad company's duty to serve the public impartially.
Pittsburgh, etc., R. Co. v. Wood, 1, 16 (25).
16. *Negligence.—Complaint.—Common Count for Services of Surgeon Treating Injured Employee.—License.*—Railroad companies may employ surgeons to treat injured employees; and a common count for services rendered is sufficient in an action by a surgeon who performed such services, an averment that the plaintiff was licensed being unnecessary.
Southern R. Co. v. Hazelwood, 478, 480 (1), 481 (1).
17. *Claim Agents.—Ratification of Acts of.—Employment of Surgeons.*—A railroad claim agent, or "assistant law agent," having power to compromise claims, who authorized the employment of plaintiff to attend an injured employee, and whose settlement of such employee's case by the payment of a certain sum and by the agreement to pay the doctors' bills, was adopted and ratified, had authority to employ a physician, and the company is estopped to deny such authority.
Southern R. Co. v. Hazelwood, 478, 480 (2), 482 (2).
18. *Claim Agents.—Employment of Surgeons.—Authority.*—Whether a claim agent acts within the scope of his authority in employing a surgeon to attend an injured employee, is a question of evidence.
Southern R. Co. v. Hazelwood, 478, 481 (3).
19. *Claim Agents.—"Law Agents."—Authority.—Verdict.—Appeal.*—A verdict, founded upon some evidence, that a railroad company's "law agent" had authority to employ a surgeon to attend an injured employee, is conclusive on appeal.
Southern R. Co. v. Hazelwood, 478, 483 (5).

(B) INJURIES TO LICENSEES AND TRESPASSERS.

20. *Receivers.—Negligence.—Complaint.*—A complaint against a railroad company and its receiver, alleging that such company, by its servants, negligently ran its train against a box-car on which plaintiff was working, to his damage, states no cause of action against such receiver.
Harmon v. Perkins, 83, 86 (3).

(C) ACCIDENTS AT CROSSINGS.

21. *Crossing Accidents.—Justices of the Peace.—Complaint.*—A complaint, in an action before a justice of the peace, alleging that defendant railroad company negligently ran its engine against plaintiff's horse and wagon, at a speed in violation of the city ordinance, after the defendant knew or should have known of the danger, and without any negligence on plaintiff's part, to plaintiff's damage, states a cause of action.
Cleveland, etc., R. Co. v. Moore, 58, 59 (1).
22. *Crossing Accidents.—Last Clear Chance.—Evidence.*—Where it was impossible for the engineer to avoid the accident complained of, after he ascertained, or should have ascertained, the danger, the company is not liable.
Cleveland, etc., R. Co. v. Moore, 58, 60 (3).

RAILROADS—Continued.

23. *Crossing Accidents.—Evidence.*—Where a driver, in the night, drove upon a crossing, without using any care, and his horse was killed by a passing train, no recovery can be permitted.
Cleveland, etc., R. Co. v. Moore, 58, 60 (5).
24. *Interurban.—Highway Crossings.—Negligence.—Complaint.*—A complaint alleging that the plaintiff's decedent was driving along a public highway, that defendant interurban railroad company negligently ran one of its cars, without signal, over the crossing, thereby killing such decedent, that the death was caused solely by reason of such negligence, shows to the ordinary person that the decedent was upon the highway and that defendant's negligence was the cause of his death.
Indianapolis, etc., Traction Co. v. Newby, 540, 542 (1).
25. *Damages.—Evidence.—Earnings of Decedent.*—In an action for damages for the death of a person evidence of "what the earnings of [decedent] would be a year, including and up to" the time of his death, is admissible, the net earnings being the proper standard in estimating the damages.
Indianapolis, etc., Traction Co. v. Newby, 540, 543 (4).
26. *Interurban.—Negligence.—Evidence.—Highway Crossing Signals.—Custom of Steam Railroads.*—In an action against an interurban railroad company for negligently killing plaintiff's decedent, because of failure to give a highway crossing signal, evidence of the custom of steam railroad companies as to the giving of such signals, is inadmissible.
Indianapolis, etc., Traction Co. v. Newby, 540, 544 (5).
27. *Interurban.—Instructions.—Proof of Complaint.—Failure to Set Out Allegations.*—An instruction that the burden is upon the plaintiff to prove the allegations of his complaint, without setting them out, is not improper.
Indianapolis, etc., Traction Co. v. Newby, 540, 544 (6).
28. *Interurban.—Damages.—Instructions.—Considering Evidence.*—An instruction, in an action for death by wrongful act, that if the jury should find for the plaintiff, it should award such damages as in its judgment would fairly compensate his decedent's widow and children, if any, dependent upon decedent for support, not exceeding the amount demanded, does not prescribe an improper measure of damages, nor invite an amount not warranted by the evidence.
Indianapolis, etc., Traction Co. v. Newby, 540, 545 (7).
29. *Interurban.—Failure to Give Highway Crossing Signal.—Interrogatories.—Harmless Error.*—In an action against an interurban railroad company for death caused by an alleged failure to give a highway crossing signal, the answer "Not sufficient evidence." to an interrogatory as to whether a signal was given 1,000 feet from the crossing, is not controlling, since neither an affirmative nor a negative answer would have required a judgment for defendant, the question of negligence still remaining for the jury. *Indianapolis, etc., Traction Co. v. Newby*, 540, 547 (11).
30. *Interurban.—Highway Crossing Accident.—Evidence.—Question for Jury.*—Where a defendant's car, running in a deep cut, approached a highway crossing, and the plaintiff's decedent was approaching the crossing from the same direction, the atmosphere being foggy, and decedent being unable to see the car more than one hundred feet, the questions of defendant's negligence

RAILROADS—Continued.

and plaintiff's contributory negligence are for the jury, where the evidence as to the giving of the proper signal is conflicting.

Indianapolis, etc., Traction Co. v. Neidby, 540, 548 (12).

31. *Interurban.—Negligence.—Highway Crossings.—Complaint.*—A complaint by a husband alleging that his wife was driving along the highway, that defendant interurban railroad company's motorman sounded his whistle, frightening one of the horses, that the team ran near the track and that such motorman, seeing the condition of the team, negligently ran his car against the wagon, to the injury of plaintiff's wife, and to his damage, states a cause of action.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 404 (1).

32. *Interurban.—Complaint.—Allegations.—Recitals.*—Allegations that "when said horse became frightened and unmanageable, it was in plain view of the defendant's motorman," and that "such condition existed a sufficient time for defendant's motorman to check the speed of the car and stop it, before striking said horses and wagon," are direct averments of issuable facts.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 404 (2).

(D) ACCIDENTS NEAR TRACKS.

33. *Interurban.—Injuries on Highways.—Frightening Horses.—Complaint.*—Where a complaint alleges that defendant interurban railroad company negligently ran its car along the highway upon which the plaintiff was traveling in a buggy, that the plaintiff's horse became frightened thereat, to defendant's knowledge, and that the defendant refused to stop its car, thereby causing such horse to throw the plaintiff from her buggy, to her injury, such charge of negligence is the gist of the action, and is the only charge defendant should be expected to meet.

Fowler v. Ft. Wayne, etc., Traction Co., 441, 443 (2).

34. *Interurban.—Use of Highways.—Nuisance.*—The authorized use of a public highway by an interurban railroad company does not of itself constitute a nuisance.

Fowler v. Fort Wayne, etc., Traction Co., 441, 443 (3).

35. *Unruly Horses.—Husband Entrusting to Son.—Contributory Negligence.—Jury.*—Whether a farmer was guilty of contributory negligence in entrusting his wife and son to drive a team having one unruly horse along a highway, knowing that interurban cars would pass thereover, is a question for the jury.

Cincinnati, etc., Electric St. R. Co. v. Cook, 401, 408 (8).

REAL PROPERTY—

See ADVERSE POSSESSION; BOUNDARIES; CONTRACTS; DEEDS; ESTATES; HUSBAND AND WIFE; QUIETING TITLE; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Right to hold, see ALIENS.

Conveyed by gift, descent of, see DESCENT AND DISTRIBUTION, 16; *Klemm v. Freud*, 587, 591 (4).

Sale of, to pay debts of decedent's estate, see EXECUTORS AND ADMINISTRATORS, 3; *Hampton v. Murphy*, 513, 519 (1).

Sold by administrator, right of action to recover barred in five years, see LIMITATION OF ACTIONS, 3; *Hampton v. Murphy*, 513, 521 (8).

Sufficiency of description, see SPECIFIC PERFORMANCE, 1; *Boyce v. Holloway*, 535, 537 (1).

RECEIVERS—

Defense of fraud of, in actions by, see ABATEMENT; *Vancleef v. Britton*, 388, 390 (3).

Judgment denying stockholders the right to intervene in suit against corporation for a receiver, appealable, see APPEAL, 5; *Thayer v. Kinder*, 111, 113 (2).

Stockholders have right to contest suit for appointment of, see CORPORATIONS, 5; *Thayer v. Kinder*, 111, 114 (5).

Stockholder may maintain suit for, see CORPORATIONS, 10, 11; *Thayer v. Kinder*, 111.

Appointed at suit of stockholders have no right to object to suits brought by other stockholders to obtain their rights, see CORPORATIONS, 12; *Thayer v. Kinder*, 111, 116 (9).

Jurisdiction to appoint, see COURTS, 5; *Thayer v. Kinder*, 111, 113 (3).

Three and one-half months, not unreasonable delay for stockholders to delay suit to set aside receiver for corporation, see LACHES; *Thayer v. Kinder*, 111, 115 (8).

Not liable for acts of company prior to appointment of, see RAILROADS, 20; *Harmon v. Perkins*, 83, 86 (3).

1. *Actions against.—Permission.*—Ordinarily, a receiver cannot be sued without the consent of the court making his appointment.

Harmon v. Perkins, 83, 85 (1).

2. *Actions against.—Federal Courts.*—Receivers appointed by the federal courts may be sued without leave of the appointing courts, where the cause of action originated out of the receivers' transactions.

Harmon v. Perkins, 83, 85 (2).

3. *Railroads.—Principal and Agent.*—Receivers and the companies for which they are appointed, are separate persons, and the agents of such companies do not represent such receivers.

Harmon v. Perkins, 83, 86 (4).

4. *Prior Acts of Company.—Liability.*—A receiver of a railroad company is not liable for the prior negligent acts of such company.

Harmon v. Perkins, 83, 87 (5).

RECITALS—

See PLEADING.

REDEMPTION—

See EXECUTION.

REFORMATION—

Cross-complaint for, may wholly defeat action for breach of contract, see COVENANTS, 4; *Tennyson v. Fleener*, 50, 51 (3).

May avoid damages for breach of alleged covenant, see DAMAGES, 6; *Tennyson v. Fleener*, 50, 51 (2).

Deeds.—Covenants.—Breach.—In an action for damages for a breach of covenant, the defendant praying for, and securing a reformation of the deed whose covenants are declared upon, such breach must be considered as relating only to the deed as reformed.

Tennyson v. Fleener, 50, 51 (1).

REHEARING—

See APPEAL, 38.

REMAINDERS—

See DEEDS; WILLS.

Adopted child takes adopting parent's interest in contingent remainder, see DESCENT AND DISTRIBUTION, 4; *Adams v. Merrill*, 315, 325 (9).

REMOVAL OF CAUSES—

Failure to Move for.—Jurisdiction.—Where a case is removable to the federal court, but the parties fail to move therefor, the state court has jurisdiction to try the case.

Pittsburgh, etc., R. Co. v. Wood, 1, 9 (4).

REPLEVIN—

Road Tools.—Township Trustees.—Road Supervisors.—A township trustee, so long as there is a legal, qualified and acting road supervisor, cannot, on behalf of his township, maintain an action in replevin to recover possession of the road tools and other effects belonging to such supervisor's district.

Cathcart v. New Durham Tp., 102, 103 (1).

REPRESENTATIONS—

Of value of land, may bind vendor, see VENDOR AND PURCHASER, 2; *Boltz v. O'Conner*, 178, 181 (2).

REPUTATION—

For morality, admissible in civil case as affecting credibility, see WITNESSES, 5; *Castle v. Clark*, 192, 195 (5).

RESCISSION—

Of sale, see SALES.

Of sale effected by broker, does not relieve principal from paying commission, where principal consummated sale to same person three days later, see BROKERS, 3; *Shelton v. Lundin*, 172, 177 (4).

RES JUDICATA—

See JUDGMENT.

REVIEW—

Of judgment, see JUDGMENT.

RIGHTS OF WAY—

See RAILROADS.

ROADS—

See HIGHWAYS.

SALES—

See BROKERS; CONTRACTS; INTOXICATING LIQUORS; SPECIFIC PERFORMANCE.

Of furs, special findings in case of breach of contract for, see CONTRACTS, 37; *Klein v. Ninde*, 672, 673 (1).

SALES—Continued.

Of real estate, by administrator, right of action for recovery, barred in five years, see **LIMITATION OF ACTIONS**, 3; *Hampton v. Murphy*, 513, 521 (8).

1. *Mutual Rescission.—Instructions.—Evidence.—Applicability.—Agency.*—An instruction on the theory of the mutual rescission of the sale of a cash register is not applicable to the evidence where the defendant testified that he executed an absolute written order for such machine, that the agent told him that such order would not take effect until he had given the machine a trial and had accepted it, that he tried the machine, declined to accept it, and so told the agent who said: "Well, all right. You had better write to the company and tell them that you are going to ship it back."

McCaskey Register Co. v. Curfman, 297, 303 (1).

2. *Contracts.—Principal and Agent.—Authority.—Burden of Proof.*—A merchant who executed an unqualified written order to an agent for a cash register knowing that such order would be sent to the company, assumes the burden of proving that such agent had authority to execute a collateral contradictory oral contract, binding upon the company, whereby the sale of such machine was optional upon such merchant's trial and acceptance thereof.

McCaskey Register Co. v. Curfman, 297, 303 (2), 305 (2).

SALOON—

May be a nuisance, but landlord to be liable must have notice thereof, see **NUISANCE**, 3; *Joseph Schlitz Brewing Co. v. Shiel*, 621, 625 (4).

SCHOOLS—

1. *Teacher.—Implied Qualifications.—Contracts.*—A school teacher in accepting employment impliedly agrees that he has the requisite knowledge to teach the prescribed branches, and that he has the ability, in a reasonable degree, to impart that knowledge to pupils.
Biggs v. School City of Mount Vernon, 572, 575 (2).
2. *Teachers.—"Incompetent."—Discharge.—Justification.*—A school board is justified in discharging a school teacher who is unable to maintain discipline in his school, such teacher being "incompetent."
Biggs v. School City of Mount Vernon, 572, 575 (3).

SELF-DEFENSE—

See **ASSAULT AND BATTERY**.

SET-OFF AND COUNTERCLAIM—

Judge has no right to adjudge a right of set-off against a verdict, where jury considered set-off in reaching verdict, see **JURY**; *Todd v. Mills*, 471, 473 (1).

Counterclaim for misrepresentations of vendor, see **VENDOR AND PURCHASER**, 3, 4; *Boltz v. O'Conner*, 178.

Judgment.—Motion to Modify.—A motion to modify a judgment by striking out defendant's judgment on his set-off on the ground that a judgment of a set-off cannot be rendered for a less amount than the judgment for the plaintiff, should be overruled.

Doering v. Davenport, 465, 468 (3).

SHELLEY'S CASE—

See **DEEDS**; **WILLS**.

SHERIFFS—

Sales by, rights of redemptioner, see CONTRIBUTION, 1-3; *Ellison v. Branstrator*, 307.

SHOOTING GALLERIES—

See NEGLIGENCE, 4.

SIDEWALKS—

See MUNICIPAL CORPORATIONS.

SKATING-RINKS—

See NUISANCE.

SPECIAL FINDINGS—

See TRIAL, 33-37.

SPECIFIC PERFORMANCE—

1. *Sales.—Description of Lands.—Fraud.—Complaint.*—A complaint alleging that defendants sold to the plaintiff all of the lots owned by them within a certain enclosure except one lot in the southwest corner and possibly two in the southeast corner, that in executing the deed they omitted certain other lots which they owned, that the plaintiff paid the agreed price, and that as soon as he ascertained the facts he demanded a conveyance of the remainder, which was refused, is sufficient, the description of the land contracted for being capable of ascertainment.

Boyce v. Holloway, 535, 537 (1).

2. *Sales of Lands.—Consideration.—Fraud.*—The fact that vendors contracted to sell certain lots for less than their market value does not justify them in fraudulently refusing to include all of such lots in their deed.

Boyce v. Holloway, 535, 539 (2).

3. *Real Property.—Contracts.—Inadequacy of Consideration.*—Specific performance lies to enforce contracts for the sale of real estate; but inadequacy of price can be invoked as a defense only as it furnishes evidence of fraud as a fact.

Boyce v. Holloway, 535, 539 (3).

STATUTE OF FRAUDS—

See FRAUDS, STATUTE OF.

STATUTES—

For statutes cited and construed, see p. xxv.

See DESCENT AND DISTRIBUTION; ESTATES; MASTER AND SERVANT; MECHANICS' LIENS; RAILROADS; TELEGRAPHS AND TELEPHONES; TREATIES.

Making instructions part of record, see APPEAL, 13-20.

Going upon platform of car in violation of rules, as prohibited by, does not preclude recovery, see CARRIERS, 23; *Lake Erie, etc., R. Co. v. Cotton*, 580, 585 (5).

Of limitation, see LIMITATION OF ACTIONS.

Good faith, no defense for violation of, see MUNICIPAL CORPORATIONS, 25; *Campbell v. Brackett*, 293, 297 (6).

1. *Construction.—Giving Effect to Language.*—In the construction of a statute effect should be given to all of the language used, if possible.

Lehman v. State, ex rel., 330, 335 (4).

STATUTES—Continued.

2. *Construction.—Aids to.*—The primary purpose in construing a statute is to determine the intent of the law-making body, and as aids in determining such intent, the court may consider the history of legislation on such subject, the purpose to be accomplished, and the construction courts have given to similar language.
Klemm v. Fread, 587, 590 (3).

STAVES—

Complaint for breach of contract of manufacture, see **CONTRACTS**, 35, 36; *Jennings v. Shertz*, 120.

STAY—

See **EXECUTION**.

STOCKHOLDERS—

See **CORPORATIONS**.

STREET RAILROADS—

See **CARRIERS**; **DAMAGES**.

STREETS—

See **MUNICIPAL CORPORATIONS**.

SUICIDE—

See **INSURANCE**.

SUPERVISORS—

See **HIGHWAYS**.

SUPPORT—

Loss of, see **INTOXICATING LIQUORS**.

Failure to fulfill contract for, see **CONTRACTS**, 29; *Saylor v. Obendorf*, 436, 439 (2).

SURETYSHIP AND GUARANTY—

Bonds.—Debts Contracted Prior to Execution of.—Sureties and guarantors who agree to "guarantee the payment in full of any and all true accounts which may at any time be due * * * on account of merchandise shipped to" their principal, are not liable for preëxisting accounts for goods received.

Baker v. Anderson Tool Co., 619, 621 (3).

SWITZERLAND—

See **ALIENS**.

Rights of residents of, in Indiana, see **TREATIES**, 1, 2; *Lehman v. State, ex rel.*, 330.

TAXATION—

See **TAXPAYERS**.

Tax sales, rights under, see **CONTRIBUTION**, 3; *Ellison v. Branstrator*, 307, 313 (7).

Tax deeds, see **DEEDS**.

Tax deed liens, protected, see **DEEDS**, 16; *Ellison v. Branstrator*, 307, 314 (10).

TAXATION—Continued.

Ditch Liens.—Tax Liens.—Superiority of.—A tax lien is superior to a ditch assessment lien, a tax deed ordinarily giving to the grantee a fee simple title, subject only to claims by the State, of which a ditch assessment lien is not one.

Ellison v. Branstrator, 307, 313 (8).

TAXPAYERS—

Are "aggrieved" persons, where claims are wrongfully allowed by board of commissioners, see *APPEAL*, 6; *Workman v. Bent*, 75.

Complaint by, to recover money unlawfully paid out by town, see *INJUNCTION*, 4; *Campbell v. Brackett*, 293, 294 (2).

TEACHERS—

See *SCHOOLS*.

TECHNICALITIES—

Should not alone cause a reversal, see *APPEAL*, 60; *Jennings v. Shertz*, 120, 132 (11).

TELEGRAPHS AND TELEPHONES—

As to incorporation of telephone companies, and duty of stockholders, see *CORPORATIONS*, 1-4; *Griffith v. Sprowl*, 504.

Restraining interference with telephone poles. see *INJUNCTION*, 3; *Neur Long Distance Tel. Co. v. White*, 382, 387 (3).

1. *Statutes.—Penalties.—Complaint.*—Under §5783 Burns 1908, §4178 R. S. 1881, providing that telegraph companies, under penalty, shall deliver all messages, if the addressee lives "within one mile of the telegraphic station or within the city or town in which such station is," a complaint to recover such penalty must allege that such addressee lives within one mile of the defendant's office, or within the city or town.

Western Union Tel. Co. v. Klitzke, 550, 552 (1).

2. *Contracts.—Penalties.*—Telegraph companies may lawfully contract to deliver messages at a greater distance from their offices than those prescribed by §5783 Burns 1908, §4178 R. S. 1881, and for a failure to deliver such messages the statutory penalty attaches. *Western Union Tel. Co. v. Klitzke*, 550, 553 (2).

3. *Penalties.—Statutes.*—The penalty provision of the act of 1885 (Acts 1885, p. 151, §3) applies to the statute requiring certain messages to be delivered (§5783 Burns 1908, §4178 R. S. 1881).

Western Union Tel. Co. v. Klitzke, 550, 553 (3).

4. *Delivery of Messages.*—A telegraph company cannot be compelled to deliver a message, into the country, three miles from its office, unless it contracts to do so.

Western Union Tel. Co. v. Klitzke, 550, 553 (4).

5. *Electric Lights.—Use of Poles by Others.—Streets.*—Telegraph, telephone, electric light and other companies licensed to set poles along the streets of cities impliedly consent to the use of such poles by the employees of others for the purpose of properly maintaining their wires.

Beaning v. South Bend Electric Co., 261, 271 (6).

6. *Electric Lights.—Poles.—Use of, by city.—Negligence.*—Where a city maintains a police telephone system using the poles of a telephone company, such company, as well as an electric light company, whose poles are set in the street under a license from

TELEGRAPHS AND TELEPHONES—Continued.

the city, are liable for negligence to a city employe who climbs such poles to repair the city's wires, and receives injuries by coming in contact with their wires.

Beating v. South Bend Electric Co., 261, 272 (7).

7. *Electricity.—Negligence.—Complaint.—Proof.*—An allegation that the plaintiff, a city employe engaged in disentangling his police telephone wires from the company's wires, had an express invitation from defendant telephone company to climb its poles in the prosecution of his work, is supported by proof of an implied invitation. *Beating v. South Bend Electric Co.*, 261, 276 (8).

8. *Electric Light Companies.—Negligence.—Poles.—Contributory Negligence.*—Telephone and electric light companies are liable for negligence in the maintenance of their poles and wires; and it is no defense that the injured employe might have escaped injury by doing his work in some other manner.

Beating v. South Bend Electric Co., 261, 277 (9).

TENDER—

Evidence of tender of charges, in action for failure to transport goods, see **CARRIERS**, 5; *Pittsburgh, etc., R. Co. v. Wood*, 1, 12 (15).

Complaint showing, see **INSURANCE**, 10; *Supreme Tent, etc., v. Fisher*, 419, 422 (2).

1. *What Constitutes.*—To constitute a tender there must be a definite offer to pay, and an unqualified refusal to accept.
Supreme Tent, etc., v. Fisher, 419, 426 (6).

2. *Waiver.—Ability to Perform.—Burden of Proof.*—The formal requisites of a tender may be waived, but the ability to perform must exist, the burden of proving such ability being upon the one pleading the tender. *Supreme Tent, etc., v. Fisher*, 419, 427 (7).

TEXT-BOOKS—

For text-books cited, see p. xxix.

THEORY—

See **PLEADING**.

TORTS—

See **ASSAULT AND BATTERY**; **CARRIERS**; **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROADS**.

TOWNS—

See **MUNICIPAL CORPORATIONS**.

TOWNSHIPS—

See **HIGHWAYS**.

TOWNSHIP TRUSTEES—

Not proper plaintiff, in action of replevin to recover road tools, where there is supervisor, see **REPLEVIN**; *Cathcart v. New Durham Tp.*, 102, 103 (1).

TRADE-MARKS AND TRADE-NAMES—

Misuse of trade-name, see **FRAUD**.

Complaint to restrain improper use of trade-name, see **INJUNCTION**, 5; *Computing Cheese Cutter Co. v. Dunn*, 20, 27 (8).

TRADE-MARKS AND TRADE-NAMES—Continued.

1. *Similarity.—Deceit.—Injunction.*—Where a person or a corporation has assumed a name so similar to another that the business of the latter is being diverted, or is liable to diversion thereby, injunction will lie to prevent the use of such name by the former.
Computing Cheese Cutter Co. v. Dunn, 20, 23 (2).
2. *"Anderson Cheese Cutter Company."—Right to Use.*—The use of the trade-name "Anderson Cheese Cutter Company" cannot ordinarily be restrained, the local name "Anderson" being rightly used by any one, unless by long-continued use it has gained a secondary meaning, and the words "cheese cutter" being merely descriptive, may ordinarily be used by any one.
Computing Cheese Cutter Co. v. Dunn, 20, 25 (5).
3. *Exclusiveness.—Proprietary Rights.—Injunction.*—To restrain the defendant from using a certain trade-name it is not necessary for the plaintiff to establish an exclusive or proprietary right in the words used.
Computing Cheese Cutter Co. v. Dunn, 20, 25 (6).

TRANSFERS—

See COURTS.

From Appellate to Supreme Court, see APPEAL.

TREATIES—

With Switzerland, concerning holding of lands, see ALIENS; *Lehman v. State, ex rel.*, 330, 335 (6), 337 (6).

Govern state laws as to descent of aliens, see DESCENT AND DISTRIBUTION, 1-3; *Lehman v. State, ex rel.*, 330.

1. *States.—Statutes.*—Treaties made by the federal government are superior to state laws. *Lehman v. State, ex rel.*, 330, 334 (1).
2. *Switzerland.—Aliens.—Holding Property.*—By the treaty with Switzerland in 1855, in States where aliens were not granted a right to hold lands, time was given within which such aliens had the right to sell their lands and to withdraw the proceeds.
Lehman v. State, ex rel., 330, 335 (5).

TRESPASS—

Continued trespasses constitute ground for injunction, see INJUNCTION, 1; *Wirrick v. Boyles*, 698, 700 (3).

Owner of property not liable to trespassers for mere negligence, see NEGLIGENCE, 2; *Beaning v. South Bend Electric Co.*, 261, 271 (5).

1. *Continuing.—Adverse Possession.—Multiplicity.*—Where defendant twice destroyed the plaintiffs' fence and threatened to continue its destruction, he may be enjoined, since such continuing acts constitute a basis for the claim of title by adverse possession, and also the remedy at law is inadequate.
Wirrick v. Boyles, 698, 700 (4).

2. *General Verdict. — Interrogatories. — Reversal. — Mandate.*—Where a complaint alleged, among other acts of trespass, that the defendant authorized the cutting of plaintiff's trees and the destruction of his wheat and fences, to his damage, answers to interrogatories which fail to negative all of such acts will not overturn a general verdict for the plaintiff; and a judgment for the plaintiff may be ordered on a reversal. Rabb, P. J. and Myers, C. J., dissent.
Boyer v. Indianapolis, etc., Traction Co., 683, 687 (3).

TRIAL.

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|----------------------------------|---|
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Burden of proof, see EVIDENCE.

Permission may be given for filing answer, after beginning of trial, see PLEADING, 18; *New Long Distance Tel. Co. v. White*, 382, 386 (1).

I. RECEPTION OF EVIDENCE.

1. *Objections.—Changing of, on Appeal.*—Where a party makes specific objections to the admission of evidence at the trial, he cannot present different reasons therefor on appeal.
Pittsburgh, etc., R. Co. v. Rogers, 230, 246 (17).
2. *Objections.—Specificness.—Exceptions.*—On the overruling of an objection to evidence, an exception must be reserved; and objections that the questioned testimony is immaterial, or incompetent, or that the question asked was suggestive, present no questions.
Pcthtel v. Pcthtel, 664, 671 (9).

II. TAKING CASE FROM JURY.

(A) DIRECTING VERDICT.

Defective complaint, cured by verdict, where verdict was directed for defendant, the evidence only being considered, see PLEADING, 23; *Beaning v. South Bend Electric Co.*, 261, 266 (1), 267 (1).

Directing verdict in action against telephone and electric light companies, see NEGLIGENCE, 13; *Beaning v. South Bend Electric Co.*, 261, 279 (12).

3. *Jury.*—Where there is any evidence, direct or inferential, tending to support the plaintiff's cause of action, a verdict for the defendant should not be directed.

Beaning v. South Bend Electric Co., 261, 267 (3).

4. *Joint Defendants.—Negligence.*—In an action against two defendants for negligence, if there is evidence tending to support a judgment against one or both, a judgment on a directed verdict for both will be reversed.

Beaning v. South Bend Electric Co., 261, 268 (4).

5. *Taking Case from Jury.—Appeal.*—A directed verdict for the defendant can be upheld, on appeal, only where the facts, together with the inferences therefrom, most favorable to the plaintiff, wholly fail to entitle him to any relief.

Saylor v. Obendorf, 436, 438 (1).

6. *Proving Different Cause of Action.—Variance.*—Where the evidence shows a wholly different cause of action from the one alleged, a verdict for defendant should be ordered.

Saylor v. Obendorf, 436, 440 (3).

(B) DEMURRER TO EVIDENCE.

7. *Taking Case from Jury.—Assessment of Damages.*—It is discretionary with the trial judge, upon the filing of a demurrer to the evidence, to have the jury assess the damages conditionally, or to discharge the jury and, if the demurrer be overruled, to empanel a new jury to make such assessment, the latter course being preferable.
Plaskett v. Benton-Warren, etc., Soc., 358, 360 (1).

TRIAL—Continued.

8. *Taking Case from Jury.—How Considered.*—On defendant's demurrer to the evidence the court must accept as true all facts favorable to the plaintiff which the evidence shows either directly or by inference, and where the evidence is in conflict that which is unfavorable to the plaintiff must be rejected.

Plaskett v. Benton-Warren, etc., Soc., 358, 360 (3).

9. *Taking Case from Jury.—New Trial.*—On the overruling of defendant's demurrer to the evidence a new trial cannot be asked or granted, the facts, except on the assessment of damages, being admitted by such demurrer.

Plaskett v. Benton-Warren, etc., Soc., 358, 365 (5).

III. INSTRUCTIONS TO JURY.

Making instructions part of record, see **APPEAL**, 13-20.

Questioned instructions, to be considered, must be set out in brief. see **APPEAL**, 36; *Pethel v. Pethel*, 664, 672 (11).

Exceptions must be taken to the giving of instructions, see **APPEAL**, 57; *Indianapolis, etc., Transit Co. v. Walsh*, 42, 48 (6).

May be cured by interrogatories, see **APPEAL**, 58; *Hill v. Hill*, 99, 101 (4).

In case of assault and battery, see **ASSAULT AND BATTERY**, 1, 2; *Reichers v. Dammeier*, 208.

In action by client to recover money collected by attorney, see **ATTORNEY AND CLIENT**, 3; *Spencer v. Smith*, 17, 20 (3).

In action against carrier for failure to transport goods, see **CARRIERS**, 7, 12, 13; *Pittsburgh, etc., R. Co. v. Wood*, 1.

In actions against carriers for personal injuries, see **CARRIERS**.

In railroad condemnation proceeding, see **EMINENT DOMAIN**, 4; *Indianapolis, etc., R. Co. v. Shea*, 608, 612 (5).

In an action against a saloon-keeper for loss of support, see **INTOXICATING LIQUORS**, 1, 2; *State, ex rel., v. Dudley*, 674.

In actions against masters, see **MASTER AND SERVANT**, 43-57.

Motion for a new trial must designate questioned instructions, see **NEW TRIAL**, 2; *State, ex rel., v. Dudley*, 674, 675 (2).

In railroad cases, see **RAILROADS**, 27, 28.

As to rescission of sale, see **SALES**, 1; *McCuskey Register Co. v. Curfman*, 297, 303 (1).

10. *Duplication.*—An instruction requested, covered by one given, should be refused.

Dunlap v. Indiana Union Traction Co., 347, 349 (1).

Indiana Union Traction Co. v. Ohne, 632, 636 (5).

Terre Haute Traction, etc., Co. v. Payne, 132, 144 (14).

11. *Inapplicability.*—Instructions not applicable to the evidence should not be given.

Dunlap v. Indiana Union Traction Co., 347, 350 (4).

Indiana Union Traction Co. v. Ohne, 632, 635 (4).

12. *Argumentative.*—Argumentative instructions are properly refused. *Indiana Union Traction Co. v. Ohne*, 632, 637 (8).

13. *Prolivity.—Vagueness.*—Instructions should be terse and clear. *Dunlap v. Indiana Union Traction Co.*, 347, 349 (2).

14. *Abstract.—Failing to Apply.*—An abstract instruction is not erroneous, where the application thereof to the facts is made in other instructions. *Pittsburgh, etc., R. Co. v. Wood*, 1, 14 (22).

TRIAL—Continued.

15. *Misleading*.—An instruction which, considered with others, does not mislead the jury, is harmless.
Reichers v. Dammeter, 208, 210 (2).
16. *Correct but Incomplete*.—The giving of an instruction which is correct so far as it goes, but which purports to be, and is, incomplete, is not erroneous.
Pittsburgh, etc., R. Co. v. Rogers, 230, 247 (19).
17. *Imperfections*.—*Appeal*.—Where the jury was fairly instructed upon the merits of the case, mere imperfections in some of the instructions which did not mislead the jury, are not cause for a reversal.
Indiana Match Co. v. Kennedy, 627, 632 (4).
Pittsburgh, etc., R. Co. v. Wood, 1, 13 (19).
18. *Inconsistency*.—*Estoppel*.—Appellant is estopped to complain of inconsistencies in the instructions, where such inconsistencies were caused by erroneous instructions given at its request.
Lake Erie, etc., R. Co. v. Cotton, 580, 585 (6).
19. *Failure to Sign*.—*Correction by Nunc Pro Tunc Entry*.—The function of a *nunc pro tunc* entry is to make a record of something that was done, and the failure of a judge to sign instructions cannot be remedied by a *nunc pro tunc* entry.
Bottorff v. Bottorff, 692, 693 (3).
20. *Answers to Interrogatories*.—*Evidence*.—An instruction, in an action against an interurban railroad company for death because of negligence, that if, as to any interrogatory, there is no evidence, or not sufficient evidence, the answer should be "No evidence," or "Not sufficient evidence," is not necessarily harmful to defendant, the answers being legally equivalent, both being a finding against the party having the burden of proof.
Indianapolis, etc., Traction Co. v. Newby, 540, 546 (9).

IV. VERDICT.

(A) GENERAL VERDICT.

- Binding effect of, see **JURY**; *Todd v. Mills*, 471, 473 (1).
- When controlled by interrogatories, in action by passenger for personal injuries, see **CARRIERS**, 42; *Cleveland, etc., R. Co. v. Harvey*, 153, 156 (4).
21. *Effect*.—A general verdict for the plaintiff establishes the allegations of his complaint. *Southern R. Co. v. Bufkins*, 80, 81 (1).
 22. *Effect*.—A general verdict settles all conflicts in the evidence in favor of the successful party, and establishes all allegations upon which there is any proof.
Cleveland, etc., R. Co. v. Moore, 58, 60 (2).
 23. *Deeds*.—*Delivery*.—A general verdict against appellants who were contending that the deed in controversy was delivered, is a finding that it was not.
Pethiel v. Pethiel, 664, 671 (10).
 24. *Effect*.—*Interrogatories*.—A general verdict is a finding for the successful party upon all the issues, but an answer to an interrogatory to the jury controls such verdict so far as such answer affects the verdict.
Mellott v. Indianapolis, etc., Traction Co., 88, 93 (1).
 25. *Interrogatories*.—A general verdict for the plaintiff is a finding in plaintiff's favor upon all of the issues, and answers to the interrogatories to the jury control the general verdict only when in irreconcilable conflict therewith.
Cleveland, etc., R. Co. v. Harvey, 153, 155 (2).

TRIAL—Continued.**(B) INTERROGATORIES.**

May cure instructions, see **APPEAL**, 61; *Hill v. Hill*, 99, 101 (4).

To jury, in personal injury cases, see **CARRIERS**, 42; *Cleveland, etc., R. Co. v. Harvey*, 153, 156 (4).

In actions by servants, see **MASTER AND SERVANT**, 50, 58-61.

In railroad cases, see **RAILROADS**, 29.

In case of trespass, see **TRESPASS**.

26. *Conflict*.—Conflicting interrogatories nullify one another.
Boyer v. Indianapolis, etc., Traction Co., 683, 687 (2).

27. *Verdict—Conflict*.—A general verdict for the plaintiff constitutes a finding in his favor upon all of the issues, and answers to interrogatories to the jury overturn such verdict only when they are irreconcilable therewith upon any evidence admissible within the issues.

Boyer v. Indianapolis, etc., Traction Co., 683, 686 (1).

28. *Verdict—Conflict—How Determined*.—In determining whether there is a conflict between the general verdict and answers to the interrogatories to the jury, only the pleadings, general verdict and such answers will be considered.

Cleveland, etc., R. Co. v. Harvey, 153, 156 (3).

29. *Insufficient Answers—Remedy*.—The remedy for an imperfect answer to an interrogatory to the jury, is a motion to require a complete answer.

Indianapolis, etc., Traction Co. v. Newby, 540, 547 (10).

30. *Requests for*.—Giving to the jury certain interrogatories headed by a request by defendant that they be submitted, is open to adverse criticism, but does not constitute reversible error.

Terre Haute Traction, etc., Co. v. Payne, 132, 143 (13).

V. TRIAL BY COURT.**(A) SPECIAL FINDINGS AND CONCLUSIONS OF LAW.**

In case of adverse possession, see **ADVERSE POSSESSION**, 2; *Mayer v. C. P. Lesh Paper Co.*, 250, 255 (6).

How made part of record, see **APPEAL**, 21-23.

Showing that judgment rests upon incompetent evidence work a reversal, see **APPEAL**, 64; *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (4).

Failing to show that a fence constituted a boundary line, see **BOUNDARIES**; *Mayer v. C. P. Lesh Paper Co.*, 250, 253 (3).

In cases of breach of contract, see **CONTRACTS**, 37, 38.

Should not contain evidentiary facts, see **CONTRACTS**, 38; *Shelton v. Lundin*, 172, 177 (3).

A suit to prevent sale of unissued shares of capital stock of corporation, see **CORPORATIONS**, 3; *Griffith v. Sproul*, 504, 510 (7).

On trial of exceptions to final report, see **EXECUTORS AND ADMINISTRATORS**, 9; *Roberts v. Dimmett*, 566, 568 (1).

In exception to guardian's final report, see **GUARDIAN AND WARD**, 1; *Hudspeth v. Kitchen*, 524, 526 (1).

In suit to foreclose a mechanic's lien, see **MECHANICS' LIENS**, 3; *Smail v. Indianapolis Mortar, etc., Co.*, 160, 161 (1).

TRIAL—Continued.

31. *Conclusions of Law.—Exceptions.*—Exceptions to conclusions of law admit the correctness of the special findings.
Roberts v. Dinnett, 566, 569 (3).
32. *Conclusions of Law.—Exceptions to.—Effect.*—An exception to conclusions of law admits that the facts within the issues are fully and fairly found.
Weeks v. Hathaway, 196, 201 (1).
33. *Failure to Find Certain Facts.—Effect.*—A failure to find certain facts is a finding against the party having the burden of proving such facts.
Layton v. Herr, 203, 207 (6).
34. *Evidentiary Facts.—When Sufficient.*—Where the findings set out evidentiary facts admitting of but one conclusion as to the ultimate fact to be proved, such fact will be considered as proved, but if doubt exists as to the proper inference, the party upon whom the burden of proving such fact rests, will fail.
Mayer v. C. P. Lesh Paper Co., 250, 255 (5).
35. *Omissions.—Burden of Proof.*—The plaintiff has the burden of proving the allegations of his complaint, and if the special findings fail to set out the facts necessary to a recovery by the plaintiff, the defendant is entitled to judgment.
Mayer v. C. P. Lesh Paper Co., 250, 251 (1).
36. *Failure of.—Fraud.*—A failure of the special findings to show fraud is fatal to a suit based upon alleged fraud.
Griffith v. Sprowl, 504, 513 (9).
37. *Conclusions of Law.—Questioning Correctness of.—New Trial.*—The correctness of conclusions of law upon a special finding of facts can be raised by exceptions to such conclusions, but not by a motion for a new trial.
Boos v. Siegmund, 284, 285 (2).

TRUSTEES—

See TOWNSHIP TRUSTEES.

TRUSTS—

- Mother of bastard child is trustee, for benefit of child, of money recovered in bastardy case, see **BASTARDY**, 2; *Lewis v. Hershey*, 104, 106 (2).
- Person knowingly borrowing money from trustee becomes trustee to beneficiary, see **BASTARDY**, 3; *Lewis v. Hershey*, 104, 106 (3).
- Declarations of trustee, see **EVIDENCE**, 12-14; *Traylor v. Hollis*, 680.
- Person may hold real property in trust, see **VENDOR AND PURCHASER**, 9, 10; *Weeks v. Hathaway*, 196.
1. *Certificates of Deposit.—Trustees.*—A certificate of deposit given by a person to his wife to be delivered, at his death, to the beneficiary, constitutes a trust fund in favor of such beneficiary.
Traylor v. Hollis, 680, 682 (1).
 2. *Conveyances.—Consideration.*—Where certain persons appointed another to purchase certain lands, the deed to be taken in his name, the purchase money being furnished by them, a trust arises in their favor (§4019 Burns 1908, §2976 R. S. 1881), and they may require the sale of such land and a distribution of the proceeds.
Dressel v. Lobstein, 595.
 3. *Limitation of Actions.—Bastardy.—Money Recovered.*—Where the father of a daughter who recovered a sum of money in a bastardy case, borrowed such money, knowing of such recovery, he

TRUSTS—Continued.

thereby becomes a trustee of such money, and the statute of limitations does not begin to run against an action therefor by such child until after his clear and unequivocal repudiation of such trust.

Lewis v. Hershey, 104, 108 (5).

VALUE—

Opinion of, sometimes binding, see **VENDOR AND PURCHASER**, 2;
Boltz v. O'Conner, 178, 181 (2).

VARIANCE—

See **PLEADING**.

VENDOR AND PURCHASER—

See **ALIENS**; **BOUNDARIES**.

Conflicting evidence as to breach of warranty will not be weighed on appeal, see **APPEAL**, 51; *Underwood v. Deckard*, 663.

Declarations of vendor, see **EVIDENCE**, 10, 11; *Pethtel v. Pethtel*, 664.

Declarations of nominal purchaser, admissible to establish resulting trust in favor of third person, see **EVIDENCE**, 13; *Traylor v. Hollis*, 680, 682 (3).

1. *Lands.—Representations.—Presumptions.*—A vendor is presumed to know the truth of his representations as to the character of soil on his farm, and the value thereof.
Boltz v. O'Conner, 178, 180 (1).
2. *Representations.—Opinions.—Value.*—Representations as to the value of a farm are usually considered as merely expressions of opinion; but where the vendor knows that the purchaser is wholly ignorant of the value of the land, and the value is stated as a fact and relied upon, to the vendor's knowledge, the vendor is bound thereby.
Boltz v. O'Conner, 178, 181 (2).
3. *Representations as to Value.—Answer.—Counterclaim.*—Allegations in an answer and in a counterclaim that the vendor falsely represented that his farm was worth \$19,000, that the purchaser was not acquainted with the value thereof, that relying upon the representation he purchased said farm, and that such farm was not worth more than \$12,000, do not show that such representation was more than the expression of an opinion.
Boltz v. O'Conner, 178, 181 (3).
4. *Representations as to Soil.—Answer.—Counterclaim.*—Allegations in an answer and in a counterclaim that the vendor falsely represented the soil on his farm to be rich, very productive, deep and black, for the purpose of cheating the purchaser, that the purchaser was ignorant of the falsity thereof, and that the purchaser was injured thereby, sufficiently show false representations of facts, and constitute a good defense and counterclaim to an action for the purchase price.
Boltz v. O'Conner, 178, 181 (4).
5. *False Representations.—Fraud.*—Vendors who falsely represent to a purchaser's injury, are ordinarily not permitted to take advantage thereof under the pretense that the purchaser should not have believed them.
Boltz v. O'Conner, 178, 183 (5).
6. *False Representations.—Fraud.*—A vendor's statements that the soil on his land is very productive, rich, deep, and black, are expressions of fact and not of opinion.
Boltz v. O'Conner, 178, 183 (6), 184 (6).

VENDOR AND PURCHASER—Continued.

7. *Representations.*—"Rich" Soil.—The word "rich," when applied to the soil, imports fertility, productiveness, and abundance of yield. *Boltz v. O'Conner*, 178, 183 (7).
8. *"Hold."*—*Real Property.*—The word "hold," as applied to the title to real estate, imports the duration of the tenure of the estate. *Lehman v. State, ex rel.*, 330, 336 (8).
9. *Real Property.*—*Trusts.*—*Actual Notice.*—A purchaser, without actual notice, who purchases real estate from the legal owner thereof, takes the title thereto, where such legal owner was holding such land in trust under an unrecorded instrument (§3964 Burns 1908, §2932 R. S. 1881). *Weeks v. Hathaway*, 196, 201 (2).
10. *Real Property.*—*Trusts.*—*Notice.*—Where the actual owner of one-half of a tract of land is in possession of the whole tract, accounting to the owner of the other half in rents, the other owner holding the legal title to the whole tract, a purchaser of the tract, actually knowing that such possessor claimed some title to such tract, takes title to but one-half thereof. *Weeks v. Hathaway*, 196, 201 (3), 203 (3).
11. *Adverse Claims.*—*Notice.*—A purchaser is chargeable with notice of another's claim of title, where the circumstances are such that he should have known thereof. *Weeks v. Hathaway*, 196, 202 (4).
12. *Liens.*—*Waiver.*—A vendor waives his right to a lien by taking collateral security for the debt. *Buffalo, etc., Quarries Co. v. Davis*, 116, 119 (2).
13. *Liens.*—*Revivor.*—*Written Contracts, Varying by Parol Evidence.*—A vendor's lien waived by the taking of collateral security cannot be revived; and a written contract accepting collateral security cannot be varied by parol testimony. *Buffalo, etc., Quarries Co. v. Davis*, 116, 120 (3).
14. *Sales of Lot Covered by Portion of Building.*—*Easement.*—*Special Findings.*—Special findings showing that a vendor sold a lot of ground upon which a portion of a house was situated, are not sufficient to warrant a conclusion of law that the purchaser took the lot subject to a reservation of the right to continue the use thereof by such owner of the house, there being nothing to show the character or condition of the house. *Mayer v. C. P. Lesh Paper Co.*, 250, 253 (4).

VENIRE DE NOVO—

See **MOTIONS.**

VERDICT—

See **TRIAL.**

WAIVER—

By failing to discuss in briefs, on appeal, see **APPEAL**, 27-36, 59.

Of tender, see **TENDER**, 2; *Supreme Tent, etc., v. Fisher*, 419, 427 (7).

Of right to vendor's lien by taking collateral security, see **VENDOR AND PURCHASER**, 12, 13; *Buffalo, etc., Quarries Co. v. Davis*, 116.

WARRANTY—

See **DEEDS; VENDOR AND PURCHASER.**

WIDOWS—

See DESCENT AND DISTRIBUTION.

WILLS—

Election under, by widow, see DESCENT AND DISTRIBUTION, 9; *Roberts v. Dimmitt*, 566, 570 (6).

Testimony of former witness, now a nonresident, admissibility of. see EVIDENCE, 24; *Reichers v. Dammeier*, 208, 209 (1).

1. *Codicils.—Effect.*—The purpose of a codicil is to enlarge, or restrain, but not to revoke, or supersede, the provisions of a will.
Lee v. Lee, 645, 647 (1).

2. *Construction of Language.—Presumptions.*—The presumption is that the words of a will were employed in their customary legal sense.
Clore v. Smith, 340, 342 (2).

3. *Construction.—Intention.—How Ascertained.*—In construing a will the courts will consider only the language used in the will.
Lee v. Lee, 645, 648 (2), 649 (2).

4. *Construction.—Rules for.*—Technical rules for the construction of wills will not overthrow the evident intent of the testator, unless such intent is in violation of the law.

Coulter v. Crawfordsville Trust Co., 64, 68 (1).

5. *Technical Words.*—Technical words in a will should be given their legal effect, unless other language used shows clearly that they were used with a different meaning.

Coulter v. Crawfordsville Trust Co., 64, 68 (2).

6. *Supplying Words.*—Words may be supplied in a will, where they do not oppose the manifest intent.

Coulter v. Crawfordsville Trust Co., 64, 68 (3).

7. *Ambiguities.—Construction by Parties.*—Where a testator gave to his wife "fifteen hundred dollars to stand in the farm," and such widow and the other devisees and legatees agreed that such amount should be considered as a bequest and be a lien upon the farm, a devisee who purchased other interests on a basis of such agreement, cannot evade the payment of such sum to the administrator of such widow upon her death.

Coulter v. Crawfordsville Trust Co., 64, 68 (6).

8. *Construction.—Intention.*—A will should be so construed as to carry out the intention of the testator, and the courts in doing so will consider all parts thereof. *Hayes v. Martz*, 704, 706 (1).

9. *Conditions.—Failure of.*—A provision in a will that if the devisee should die before he becomes twenty-one years old the property shall go to certain persons, will not be considered, where such devisee attained such age. *Hayes v. Martz*, 704, 707 (2).

10. *"Heirs."*—The term "heirs," as used in a will, is a word of limitation. *Lee v. Lee*, 645, 649 (5).

11. *Language of.—"Descend."*—The word "descend," as used in a will providing that "if said John Horsely Hayes shall die leaving children, the farm shall descend to them," means to "go to."

Hayes v. Martz, 704, 707 (3).

12. *Devise to Devisee and His Heirs.—Rule in Shelley's Case.*—A devise to a devisee and his heirs, either mediately or immediately, gives a fee-simple title to such devisee. *Lee v. Lee*, 645, 648 (3).

WILLS—Continued.

13. *Codicils.—Construction.—Estates.—“Heirs of” Devisee.*—A will devising certain real estate to the devisee “in fee simple,” followed by a codicil revoking and cancelling such devise and giving in lieu thereof the same land “to vest in said [devisee] at [testator’s] death for a period of natural life of said [devisee] and at the death of said [devisee] the remainder and the fee simple of said described real estate * * * shall vest in the heirs of” said devisee, gives to such devisee a fee-simple title.
Lee v. Lcc, 645, 649 (6).
14. *Devise of Fee Simple.—Limiting.*—A will in form: “I will and bequeath unto my grandson * * * the farm on which I now live,” and further providing in a subsequent clause that if such grandson should “die before he attains the age of twenty-one years, the property hereby willed to him shall be equally divided between my two children” and that if such grandson should “die leaving children, the farm shall descend to them, but it is not to be sold or disposed of by said” grandson, gives to such grandson a fee simple.
Hayes v. Martz, 704, 709 (5).
15. *Devise of Fee Simple.—Subsequent Words Cutting Down.*—Where a provision of a will gave to the devisee a fee-simple title, a subsequent clause, to cut down such estate, must use language equally clear and specific, limiting such estate.
Hayes v. Martz, 704, 708 (4).
16. *Remainders.—Contingent.—Vested.—Postponement.—Presumptions.*—The law favors the vesting of estates absolutely, rather than contingently, and at the earliest possible moment, the presumption being that words of postponement relate to the beginning of the time of enjoyment and not to the vesting of the estate.
Clore v. Smith, 340, 342 (1).
17. *Remainders.—Vesting.*—A will devising to testator’s widow certain real estate for life, and further providing that “at her death * * * the rest and residue of [his] property to be divided among [his] children then living and their descendants,” gives a remainder to testator’s children, vesting at his death, but the enjoyment of which was postponed until the death of such widow.
Corey v. Springer, 138 Ind. 506, and *Wood v. Robertson*, 113 Ind. 323, distinguished.
Clore v. Smith, 340, 343 (3).
18. *Legacies.—Vesting.—Enjoyment.*—A will bequeathing to each of two of testator’s sons a certain sum of money, making such sums a charge upon certain devised lands, and providing that “at her [testator’s widow’s] death, after the payment of said sums” the remainder of the property to be divided, gives a legacy to such two sons, vesting at testator’s death and payable upon the death of his widow.
Clore v. Smith, 340, 346 (4).
19. *Construction.—Complaint.—Theory.—Contracts.*—A complaint setting out a will and alleging that the parties thereto agreed upon a certain construction thereof, and demanding that the defendant shall perform the provisions of such will as construed, proceeds upon the theory of enforcing such agreement, and not of enforcing the will as it might be construed.

Coulter v. Crawfordville Trust Co., 64, 68 (5).

WITNESSES—

Contradictions in testimony of witness, question for jury, see APPEAL, 49; *Boos v. Siegmund*, 284, 285 (3).

WITNESSES—Continued.

1. *Nonexperts.—Insanity.—Weight of Evidence.*—Nonexperts who have observed defendant's actions, may, after stating the facts, give their opinions as to his sanity, the weight of such evidence being for the jury. *Wiseman v. Gouldsberry*, 677, 679 (3).
2. *Cross-Examination.—Limits of.—Injuries.—Evidence.*—It is not erroneous for the trial court to refuse to permit defendant to inquire on cross-examination as to plaintiff's declarations concerning her injuries, where the witness had been asked in chief only as to the color of plaintiff's skirt.
Indianapolis, etc., Transit Co. v. Walsh, 42, 46 (3).
3. *Cross-Examination.—Collateral Questions.—Eminent Domain.—Damages.*—In an action against a railroad company for damages caused by constructing its road in front of the plaintiff's property, the trial court's refusal to permit a witness on cross-examination to be interrogated concerning the value theretofore by him placed on other property, does not show an abuse of discretion.
Indianapolis, etc., R. Co. v. Shea, 608, 612 (6).
4. *Credibility.—Jury.*—The credibility of a witness is a question for the jury. *Pethel v. Pethel*, 664, 670 (5).
5. *Credibility.—Reputation for Morality.—Evidence.*—Evidence of a party's reputation for morality is admissible, in a civil case, as affecting his credibility, but such evidence should be explicitly confined to such purpose. *Castle v. Clark*, 192, 195 (5).
6. *Impeachment.—Collateral Matters.*—A witness may not be contradicted, as to collateral matters, by evidence of contradictory statements contained in letters. *Bottorff v. Bottorff*, 692, 693 (5).

WORDS AND PHRASES—

See STATUTES.

"Aggrieved" persons, see APPEAL.

"At or near," meaning of, see CARRIERS, 27; *Terre Haute Traction, etc., Co. v. Payne*, 132, 135 (1).

"Children," meaning of, see DEEDS, 9; *Adams v. Merrill*, 315, 326 (11).

"Descend," meaning of, see WILLS, 11; *Hayes v. Martz*, 704, 707 (3).

"Dust," meaning of, as used in factory act, see MASTER AND SERVANT, 1, 10; *Indianapolis Foundry Co. v. Bradley*, 530.

"Fair preponderance" of evidence, see CARRIERS, 39; *Terre Haute Traction, etc., Co. v. Payne*, 132, 141 (10).

"Free access" to depot, meaning of, see RAILROADS, 1-3; *Pittsburgh, etc., R. Co. v. Town of Remington*, 561.

"Guarantee," meaning of, see CONTRACTS, 1; *Bailey v. Miller*, 475, 476 (1).

"Guarantee" the possession of rights to a patent, see CONTRACTS, 9; *Bailey v. Miller*, 475, 476 (2), 477 (2).

"Heirs," meaning of, see DEEDS, 10; *Adams v. Merrill*, 315, 328 (13).

"Heirs," meaning of, see WILLS, 10; *Lee v. Lee*, 645, 649 (5).

"Heirs of" devisee, meaning of, see WILLS, 13; *Lee v. Lee*, 645, 649 (6).

"Heirs of the body," meaning of, see DEEDS, 8, 9; *Adams v. Merrill*, 315.

"Hold," as applied to title, meaning of, see VENDOR AND PURCHASER, 8; *Lehman v. State, ex rel.*, 330, 336 (8).

WORDS AND PHRASES—Continued.

- "Incompetent," as applied to teacher, see *SCHOOLS*, 2; *Biggs v. School City of Mount Vernon*, 572, 575 (3).
- "Junior," meaning of, see *CONTRIBUTION*, 1; *Ellison v. Branstrator*, 307, 310 (1).
- "Lease," meaning of, see *CONTRACTS*, 8; *Stahl v. Illinois Oil Co.*, 211, 213 (1).
- "Necessary," meaning of, see *BAILMENT*, 1; *Rearoth v. Holloway*, 36, 37 (1).
- "Property," meaning of, see *ESTATES*, 2; *Adams v. Merrill*, 315, 326 (10).
- "Reasonable," meaning of, see *BAILMENT*, 2; *Rearoth v. Holloway*, 36, 38 (2).
- "Refusal of premises," meaning of, see *LANDLORD AND TENANT*, 1; *C. Callahan Co. v. Michael*, 215, 218 (1).
- "Rich" soil, meaning of, see *VENDOR AND PURCHASER*, 7; *Boltz v. O'Connor*, 178, 183 (7).
- "Right," meaning of, see *CONTRACTS*, 2; *Bailey v. Miller*, 475, 477 (3).
- "Royalty," meaning of, see *CONTRACTS*, 7; *Indiana, etc., Oil Co. v. Stewart*, 554, 560 (8).
- "Satisfaction" of jury, see *CARRIERS*, 39; *Terre Haute Traction, etc., Co. v. Payne*, 132, 141 (10).
- "Within one day from this date," meaning of in gas and oil contract, see *CONTRACTS*, 25; *Indiana, etc., Oil Co. v. Stewart*, 554, 559 (6).

WORK AND LABOR—

See *PARENT AND CHILD*.

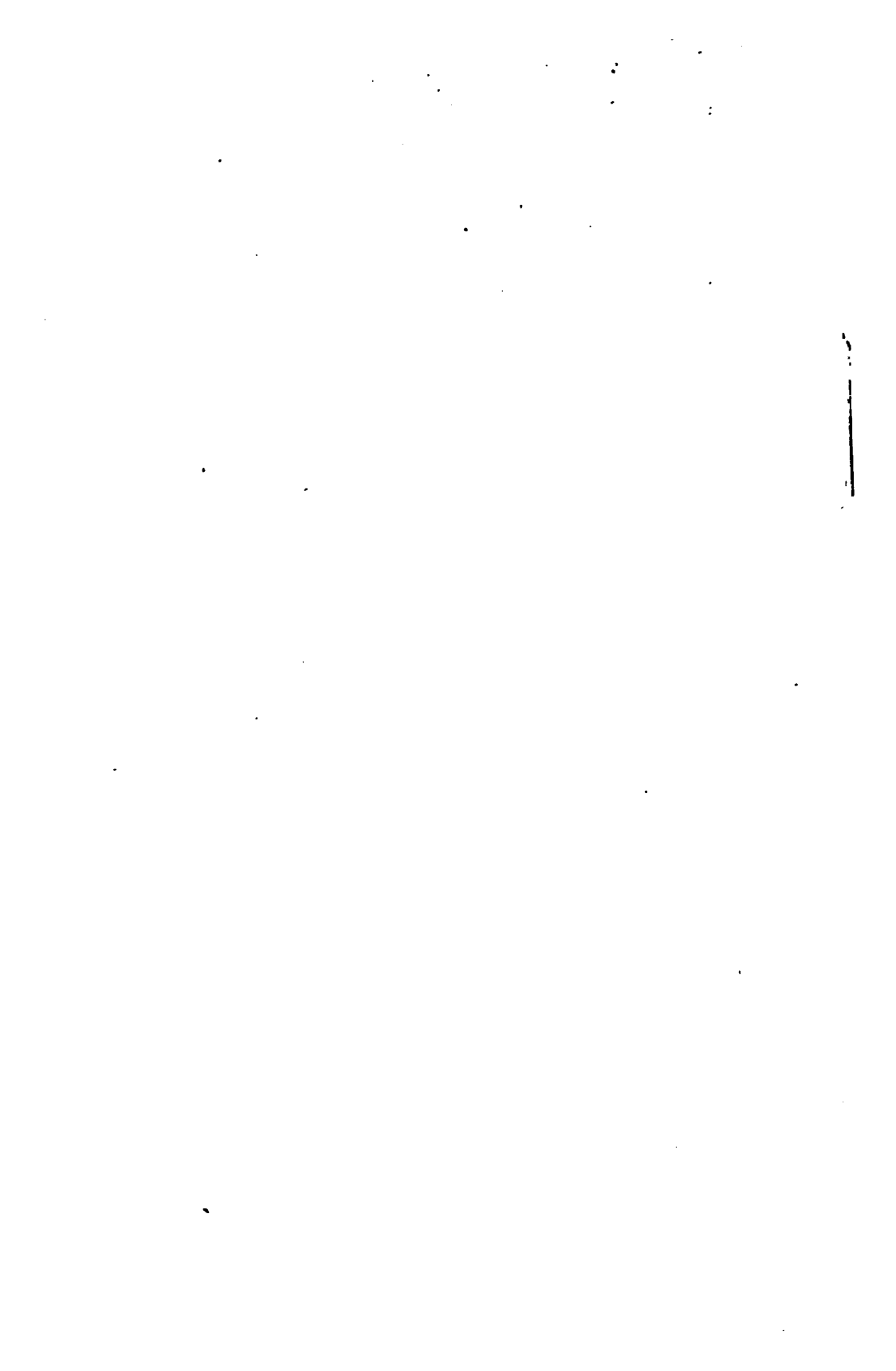
Performed by husband upon wife's separate estate, values of, not subject to execution, see *EXECUTION*; *Wasm v. Raben*, 221, 229 (5).

Money Advanced.—Complaint.—Bills of Particulars.—In an action for commissions on sales, and for money expended, a complaint which shows neither by its averments nor by the bill of particulars thereto attached that the commission was earned, nor that such money was advanced by the plaintiff, is not sufficient, a general allegation of indebtedness being insufficient.

Wulschner-Stewart Music Co. v. Helft, 428 (1).

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